Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

GROSS SEED COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND NEBRASKA DEPARTMENT OF ROADS, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress in enacting the Transportation Equity Act for the 21st Century had a strong basis in evidence to authorize and require a 50-state program of racial and gender preferences as a putative remedy for discrimination in public contracting?

2. Whether the Disadvantaged Business Enterprise (DBE) program of the United States Department of Transportation (DOT)—which discriminates on the basis of race and gender in connection with the federal funding of highway construction contracts let by states—is narrowly tailored to further a compelling interest?

3. Whether Nebraska's DBE program, which was required by DOT's DBE regulations and approved by DOT, satisfies strict scrutiny?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Gross Seed Company was the plaintiff-appellant in the court below. Respondents Nebraska Department of Roads; John L. Craig, in his capacity as the Director of the Nebraska Department of Roads; United States Department of Transportation; Federal Highway Administration; and United States, were the defendants-appellees in the court below.

Petitioner has no parent corporations, and no publicly held company owns 10% or more of its stock.

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---

PETITION FOR A WRIT OF CERTIORARI

Gross Seed Company respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 345 F.3d 964 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the District of Nebraska is unreported and reproduced at App. 15a.

JURISDICTION

The judgment of the Eighth Circuit was entered on October 6, 2003. App. 1a. The jurisdiction of the Eighth Circuit was

based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person * * * be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides: "[N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1.

Section 1101(b) of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107, 113 (1998) provides:

> (1) General Rule.—Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.
>
> (2) Definitions.—In this subsection, the following definitions apply:
>
> * * * *
>
> (B) Socially and Economically Disadvantaged Individuals.—The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

The most relevant provisions of 49 C.F.R. Part 26 are as follows:

49 C.F.R. § 26.5 provides in part:

Disadvantaged business enterprise or *DBE* means a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

* * * *

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

49 C.F.R. § 26.21 provides in part:

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA [Federal Highway Administration] recipients receiving funds authorized by a statute to which this part applies;

* * * *

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part.

* * * *

49 C.F.R. § 26.41 provides in part:

> (a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
>
> * * * *

49 C.F.R. § 26.67 provides in part:

> (a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals.
>
> * * * *

INTRODUCTION

This case presents the same important questions that this Court granted certiorari to resolve in *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001) (per curiam), but without the vehicle problems that ultimately led the Court in that case to dismiss the writ as improvidently granted.

After *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), held that all government-imposed racial classifications are subject to strict scrutiny, and *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000) (per curiam), held that Adarand's equal protection challenge was not moot, this Court granted certiorari in *Adarand Constructors, Inc.* v. *Mineta*, *supra*, to consider the merits of Adarand's claims and answer "questions of fundamental national importance calling for final resolution by this Court." 534 U.S. at 110.

Those "questions of fundamental national importance" were whether the Disadvantaged Business Enterprise (DBE)

program of the United States Department of Transportation (DOT)—which openly discriminates on the basis of race and gender in connection with the federal funding of state highway projects—was narrowly tailored to serve a compelling governmental interest and whether the Tenth Circuit had misapplied the strict scrutiny standard. This Court did not resolve those questions, however, but instead dismissed the writ as improvidently granted after Adarand stated for the first time at the merits stage that it was not challenging "DOT's DBE program as it pertains to the use of federal funds for highway projects let by States." *Id.* at 107.

Like *Adarand*, this case involves an equal protection challenge to DOT's DBE program. But unlike Adarand, Gross Seed Company *is* challenging the program as it relates to the federal funding of state highway projects. The court below upheld the constitutionality of that program, both on its face and as implemented by the State of Nebraska, the state where Gross Seed does business, and Gross Seed seeks review of that judgment. Thus, this case affords the Court an opportunity to resolve the important questions that *Adarand* appeared, but in the end failed, to present.

The decision below also warrants review so that this Court can consider the Eighth Circuit's holding that the federal government can authorize or require Nebraska to implement racial preferences without showing that "the record before Congress included strong evidence of race discrimination in construction contracting *in* * * * *Nebraska*." App. 8a (emphasis in original). Under that holding, Congress can permit or even mandate racial preferences coast-to-coast in every state (and in even smaller jurisdictions) as a putative remedy for discrimination even if Congress had no evidence that discrimination is a problem in a particular state or all 50 states.

Given the dismissal of the writ in *Adarand* v. *Mineta*, the fundamental national importance of the questions presented

here, the errors of the Eighth Circuit in this case, and the inconsistency between the decision below and *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001), this Court's review of the decision below is warranted.

STATEMENT OF THE CASE

TEA-21 and DOT's DBE Regulations. The Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) ("TEA-21"), provides that "not less than 10 percent" of the funds provided by the federal government to the states for highway construction projects shall be set aside for small businesses owned and controlled by "socially and economically disadvantaged individuals." *Id.* § 1101(b), 112 Stat. at 113.

TEA-21 further provides that "[t]he term 'socially and economically disadvantaged individuals' has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) * * *; except that women shall be presumed to be socially and economically disadvantaged individuals." *Id.* § 1101(b)(2)(B), 112 Stat. at 113.

In enacting TEA-21, Congress made no findings with respect to the purpose of the 10% set aside in section 1101(b) or the evidence of which Congress was cognizant that supported the use of racial and gender preferences.

DOT promulgated regulations implementing TEA-21 in 1999. *See* 49 C.F.R. Part 26. Under these regulations, members of five racial and ethnic groups—"Black Americans," "Hispanic Americans," "Native Americans," "Asian-Pacific Americans," and "Subcontinent Asian Americans," including more than three dozen subgroups—and all women are presumed to be socially and economically disadvantaged and hence eligible for TEA-21's 10% set aside. *Id.* § 26.5.

To receive federal-aid highway funds, a state must have a DBE program approved by the DOT. *See id.* § 26.21(a) ("If

you are [a recipient of DOT assistance] and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part"); *id.* § 26.21(c) ("You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part."). In its DBE program, a state must presume that members of the five groups listed in 49 C.F.R. § 26.5 and women are disadvantaged. *See id.* § 26.67(a)(1) ("You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals.").

The presumption of disadvantage is rebutted for an individual who has a personal net worth exceeding $750,000, *see id.* § 26.67(b)(1), not counting the individual's ownership interest in a DBE firm or equity in his or her primary residence, *see id.* § 26.5. If a state has a "reasonable basis" to believe that a presumptively disadvantaged individual is not, in fact, socially or economically disadvantaged, the state "may" start a proceeding "to determine whether the presumption should be regarded as rebutted as to that individual." *Id.* § 26.67(b)(2). The state shoulders the burden of proof in such a proceeding. *See id.* § 26.67(b)(3).

As part of its DBE program, a state must "set an overall goal for DBE participation in [its] DOT-assisted contracts," *id.* § 26.45(a)(1), and must submit its overall goal to DOT for review on an annual basis, *see id.* § 26.45(f)(1). After review, DOT may adjust the state's overall goal or require that the state do so. *See id.* § 26.45(f)(4). When a state submits its overall goal to DOT it must also project the portion of the goal it expects to meet through race- and gender-neutral means and its basis for that projection; this projection is "subject to approval" by DOT. *Id.* § 26.51(c).

A state must meet "the maximum feasible portion of [its] overall goal by using race-neutral means of facilitating DBE participation." *Id.* § 26.51(a). Although "quotas" are not permitted, *id.* § 26.43(a), states "may use set-asides" when "limited and extreme" circumstances warrant, *id.* § 26.43(b). *See also* App. 10a ("If race-neutral means are projected to fall short of achieving the overall goal, the State must give preference to firms it has certified as DBEs."). Nothing in DOT's DBE regulations, however, requires a state to possess or develop evidence of present or past discrimination within its borders or provide such evidence to DOT.

A state that fails to comply with "any requirement" of 49 C.F.R. Part 26 is "subject to formal enforcement action," including the "suspension or termination of Federal funds or refusal to approve projects, grants or contracts" and other "[p]rogram sanctions." *Id.* § 26.101(a). Furthermore, a state that does not have an approved DBE program or an overall goal or that fails to implement its DBE program in good faith is "in noncompliance with this part." *Id.* § 26.47(b).

Nebraska's DBE Program. The Nebraska Department of Roads (NDOR) is a recipient of federal-aid highway funds authorized by TEA-21. For Fiscal Year 2000, NDOR adopted an overall goal of 11% participation by DBEs in DOT-assisted contracts. NDOR projected that 2.33% DBE participation would be met through race- and gender-neutral means and that 8.67% DBE participation would be met through race- and gender-based means. DOT approved NDOR's program. App. 18a.

For Fiscal Year 2001, NDOR set an overall goal of 9.95% DBE participation and projected that race- and gender-neutral means would achieve 5.13% DBE participation, while 4.82% DBE participation would be met through race- and gender-conscious means. NDOR also required prime contractors to make a good faith effort to subcontract a set

portion of each contract amount to DBEs. DOT granted its approval. App. 14a, 18a.

Gross Seed Company. Gross Seed is a contractor specializing in landscaping and seeding. John C. Gross, a white male, owns 50% of Gross Seed's issued stock. Peggy L. Gross, his wife, owns the other 50%. John Gross is Gross Seed's president, and he controls and manages the company. Peggy Gross is a director of Gross Seed and its secretary and treasurer. App. 16a, 20a; NDOR C.A. App. A95, A145, A148, A157; Trial Tr. 1369-70; Second Am. Compl. ¶ 5.

Gross Seed regularly bids on and performs federally-assisted highway construction contracts in Nebraska, both as a prime contractor and a subcontractor. App. 3a, 16a; Trial Tr. 1370. Gross Seed does not qualify as a socially and economically disadvantaged business under TEA-21, its implementing regulations, or NDOR's DBE program. App. 20a; *see* 49 C.F.R. § 26.5 (for a corporation to be a DBE, 51% of its stock must be "owned by one or more individuals who are both socially and economically disadvantaged").

In January 2000, NDOR's DOT-approved DBE program caused Gross Seed to lose a subcontract to perform seeding work for which it was the low bidder. For this particular federal-aid highway project ("the Brownlee Spur project"), NDOR set a DBE participation goal of 6% of the prime contract amount. Although Gross Seed submitted the low bid of $255,771, the prime contractor awarded the subcontract to a DBE that bid $322,530. Trial Tr. 1334-47; Second Am. Compl. ¶ 50. The prime contractor did so because "[t]hat was the only option we had on this particular project to meet the DBE goal." Trial Tr. 1347. The prime contractor testified that, had there not been a DBE goal on the Brownlee Spur project, "[w]e would have used Gross Seed for the seeding items, low bidder." *Id.*

Gross Seed brought this suit against NDOR challenging the constitutionality under the Fifth and Fourteenth Amendments

of TEA-21, 49 C.F.R. Part 26, and NDOR's DBE program, both facially and as applied to Gross Seed. The federal government subsequently intervened in the case. App. 1a-2a; Second Am. Compl. ¶¶ 1, 6-9, 53-63.

During discovery, NDOR admitted that Nebraska lacks evidence of governmental discrimination against DBEs in the state in recent years. Specifically, NDOR admitted that Nebraska "has no evidence of deliberate exclusion of Nebraska DBEs in NDOR contracting [in the last] six years"; "cannot identify any NDOR highway contract awarded in the last six years in which Nebraska discriminated against Nebraska DBEs"; "cannot identify any NDOR highway contracting procedure in the last six years in which Nebraska discriminated against Nebraska DBEs"; "cannot identify any NDOR contracting personnel who have, in the last six years, discriminated against Nebraska DBEs"; and "has not taken any disciplinary action against any NDOR personnel for discrimination against Nebraska DBEs in state contracting in the last six years." NDOR also admitted that "Nebraska has never taken any action punishing any non-DBE for discrimination against a DBE in connection with any highway contract in [the] last six years." Defs.' Resp. to Plfs.' First Request for Admissions 1-2. *See also* Gross Seed C.A. App. 73.

Decisions Below. Following a seven-day bench trial, the District Court issued an opinion concluding that "TEA-21 and 49 C.F.R. Part 26 meet the requirements of strict scrutiny and are, therefore, constitutional." App. 27a. The court said that "[h]aving examined the legislative history and the regulations adopted by the Department of Transportation, the Court is satisfied that the evidence establishes a compelling interest for the adoption of TEA-21 and * * * 49 C.F.R. Part 26." App. 26a. The court also rejected Gross Seed's contention that NDOR was required to "independently establish that a compelling interest exists *in Nebraska*." *Id.* (emphasis added). The District Court therefore entered judgment dis-

missing Gross Seed's second amended complaint. *See* Order & Judgment (May 6, 2002). The court also denied Gross Seed's subsequent motion to amend findings, or in the alternative, for new trial. *See* Order (July 9, 2002).

The Eighth Circuit affirmed in an opinion that also decided a separate case involving a challenge to DOT's DBE program as implemented by the State of Minnesota. App. 1a.

The Eighth Circuit began by noting that, because DOT's DBE program "employs a race-based rebuttable presumption and authorizes the use of race-conscious remedial measures," the program is subject to strict scrutiny and hence must be narrowly tailored to further a compelling government interest. App. 6a. Following the lead the Tenth Circuit took in its last *Adarand* decision, *see Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand II*"), *cert. granted*, 532 U.S. 941, *writ dismissed*, 534 U.S. 103 (2001), the Eighth Circuit determined that the government had identified a compelling interest in this case:

> As the Tenth Circuit said in *Adarand II*, "we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." 228 F.3d at 1165. [App. 6a.]

The Eighth Circuit went on to say that "[i]n addition to identifying a compelling government interest, the government must demonstrate a 'strong basis in the evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." App. 6a. The Eighth Circuit then proceeded to "conclude that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand II*, 228 F.3d at 1167-76." App. 7a. The Eighth Circuit stated that, "[a]s the Tenth Circuit's

analysis demonstrates, Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry." App. 7a.

Having rejected Gross Seed's claim that DOT's DBE program lacked a compelling interest on its face, the Eighth Circuit next rejected Gross Seed's as applied challenge. In so doing, the court held that the government was not required to have specific evidence of discrimination *in Nebraska* or any other state. The court said:

> If Congress * * * acted for a proper purpose and with a strong basis in evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation. Thus, we reject [Gross Seed's] contention that [its] facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting *in* * * * *Nebraska*. [App. 8a (emphasis in original).]

On the issue of narrow tailoring, the Eighth Circuit held that DOT's DBE program was narrowly tailored, both on its face and as implemented by Nebraska. The court stated that the program was narrowly tailored as a facial matter because DOT's regulations (1) "place strong emphasis" on race-neutral means; (2) have "substantial flexibility" due to available waivers and exemptions and other program limits; (3) "tie[ ] the goals for DBE participation to the relevant labor markets"; and (4) make social and economic disadvantage, rather than race, the "determinative factor" in the program. App. 11a, 12a.

The Eighth Circuit also held that Gross Seed "failed to prove that the revised DBE program is not narrowly tailored as applied in Nebraska." App. 14a. The court, in a cursory paragraph, stated that NDOR's overall goal for DBE partici-

pation and its projection of the percentage of the goal that would be achieved by race- and gender-based means were based on the recommendation of MGT of America, Inc., which had performed "availability and capability studies of DBE firms in the Nebraska highway construction market." App. 14a.

REASONS FOR GRANTING THE WRIT

I. AS DID *ADARAND*, THIS CASE PRESENTS QUESTIONS OF FUNDAMENTAL NATIONAL IMPORTANCE.

Although this Court three times granted certiorari and issued opinions in the *Adarand* case, the Court never determined whether DOT's DBE program, which openly discriminates on the basis of race and gender, satisfies strict scrutiny, thus leaving that important question unresolved. This case is like *Adarand* in that it involves the same federal statutory and regulatory scheme, the same legal issues, and the same relevant fact pattern (Gross Seed, like Adarand, is a non-minority contractor that lost work due to a racial preference). Unlike *Adarand*, however, this case does not have the vehicle problems that led to the dismissal of the writ in that case. Thus, with this case the Court can do what it granted certiorari to do in *Adarand* v. *Mineta*—determine whether DOT's DBE program satisfies strict scrutiny.

In its first *Adarand* opinion, this Court, reversing the Tenth Circuit, clarified the standard of review applicable to Adarand's challenge and held that "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). The Court then remanded for the application of strict scrutiny to DOT's DBE program.

Five years later, in *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000) (per curiam), this Court—again reversing the Tenth Circuit—held that the case was not mooted by

Colorado's certification of Adarand as a DBE. Finding that Adarand's "cause of action remains alive," *id.* at 224, the Court once again remanded for further proceedings.

Finally, after the Tenth Circuit upheld DOT's DBE program, *see Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000), this Court granted certiorari to review the Tenth Circuit's judgment and consider the merits of Adarand's equal protection challenge. *See Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001) (per curiam). The Court granted certiorari on these two questions:

> 1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination?
>
> 2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest? [*Id.* at 107 n.1.]

Before it could reach those questions, however, this Court dismissed the writ as improvidently granted. The Court did so after Adarand announced for the first time at the merits stage of the case that it was "not challenging any part of DOT's state and local procurement program." *Id.* at 108. Although "[i]t appeared at the certiorari stage that petitioner was indeed challenging," that program, *id.* at 107, Adarand's merits brief made clear that Adarand was "challenging only the statutes and regulations that pertain to the DOT's direct procurement of highway construction on federal lands." *Id.* at 108. The Court noted that "while procurement by States and localities is governed by regulations issued by the Secretary of Transportation under TEA-21, direct federal procurement is governed by the Small Business Act * * * and the regulations promulgated thereunder." *Id.* The Court "thus decline[d] to reach the merits of petitioner's present challenge." *Id.* at 110.

In dismissing the writ, this Court in *Adarand* v. *Mineta* acknowledged that that case had appeared to "present[ ] questions of fundamental national importance calling for final resolution by this Court." *Id.* The difference between this case and *Adarand* is that those "questions of fundamental national importance" actually are presented here. As in *Adarand*, Gross Seed challenges DOT's DBE program on equal protection grounds. But unlike that case, Gross Seed *is* challenging "the constitutionality of the DOT's DBE program as it pertains to the use of federal funds for highway projects let by States and localities." *Id.* at 107. Thus, this case is what *Adarand* v. *Mineta* "appeared at the certiorari stage" to be. *Id.*

Furthermore, the Eighth Circuit held in this case that in enacting racial preferences "Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary *for the reasons stated by the Tenth Circuit in Adarand II*, 228 F.3d at 1167-76." App. 7a (emphasis added). Thus, one of the key holdings of the Tenth Circuit in *Adarand* that the Court was set to review in *Adarand* v. *Mineta* is again directly at issue here. And, as explained below, *see* Part II-A, *infra*, that holding by the Tenth Circuit was incorrect.

This Court in *Adarand* authored a trilogy without a final chapter. Until this Court reaches the merits of an equal protection challenge to the DOT's DBE program, the approach that lower courts should take in such cases will remain unsettled. The Court should grant review in this case and determine the constitutionality of the program on its face and as jointly implemented by the federal government and the State of Nebraska.

This Court recently denied certiorari (over the dissent of Justice Scalia, whose opinion the Chief Justice joined) in *Concrete Works of Colorado, Inc.* v. *City and County of Denver, Colorado*, 540 U.S. ___ (2003). That case involved

a racial preference in public contracting enacted by Denver on its own and without federal involvement. This case, unlike *Concrete Works*, involves an intergovernmental program authorized by Congress, required and approved by DOT, and implemented by Nebraska. This Court has never decided on the merits an equal protection challenge to such a program. *Compare City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989) (holding unconstitutional Richmond's 30% set-aside program for minority subcontractors) with *Adarand* v. *Mineta* (dismissing the writ in challenge to DOT DBE program).

II. GROSS SEED WAS SUBJECTED TO UNCONSTITUTIONAL DISCRIMINATION BY THE FEDERAL GOVERNMENT AND THE STATE OF NEBRASKA.

A. The Eighth Circuit Erred In Adopting The Tenth Circuit's Erroneous Conclusion In *Adarand* That Congress Had A Strong Evidentiary Basis For Enacting Racial Preferences.

Remedying the effects of past or present discrimination is a compelling interest that "may in a proper case justify a government's use of racial distinctions." *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996). *See Adarand*, 515 U.S. at 237. But "[r]acial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. Therefore, before the government can enact a racial preference as a remedy for discrimination, it must have "a 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Id.* (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality)). *Accord Shaw* v. *Hunt*, 517 U.S. at 910.

In this case, the Eighth Circuit's conclusion that Congress had the requisite strong basis in evidence to enact racial preferences was based entirely on the Tenth Circuit's opinion in *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th

Cir. 2000), *cert. granted*, 532 U.S. 941, *writ dismissed*, 534 U.S. 103 (2001). As the Eighth Circuit stated:

> We agree that we must take a hard look at the evidence, and we have done so. We conclude that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary *for the reasons stated by the Tenth Circuit in Adarand II*, 228 F.3d at 1167-76. [App. 7a (emphasis added).]

There, the Tenth Circuit had said that Congress' strong evidentiary basis was contained "particularly" (228 F.3d at 1176) in a document styled *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (1996). The Appendix—which was prepared by the Department of Justice in the wake of this Court's first opinion in *Adarand* with an eye toward the litigation to follow from the Court's 1995 remand—purports "to summarize the evidence that has been assembled to date on the compelling interest question" and "the legislative record that underpins the acts of Congress that authorize affirmative action measures in procurement." *Id.* at 26,050. Relying heavily on the Appendix, *see* 228 F.3d at 1167-76, the Tenth Circuit deemed Congress to have made a "finding" that "racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy." *Id.* at 1167.

The Appendix and the congressional materials cited therein do not provide a strong basis in evidence supporting the 10% set aside for minority group members and women in TEA-21. The Appendix consists mainly of citations to congressional reports and hearings and the statements of individual Members of Congress. But conclusory statements offered by legislators "are of little probative value in establishing identified discrimination in [a particular] construction industry." *Croson*, 488 U.S. at 500. And the reports and hear-

ings cited in the Appendix, some of which are now 25 years old, are far too general to support the enactment of a nationwide program applicable to nearly every racial and ethnic minority group and all women—indeed, a program apparently applicable to everyone except white males—and in every corner of the country. *See Shaw* v. *Hunt*, 517 U.S. at 909 ("A generalized assertion of past discrimination in a particular industry or region is not adequate" to justify a racial preference); *Croson*, 488 U.S. at 498. The reports and hearings do not provide evidence of discrimination in every sector of the construction industry, in every geographic market, against every racial group covered by the DBE program. Thus, TEA-21's 10% set aside "cannot in any realistic sense be tied to any injury suffered by anyone." *Id.* at 499.

The Appendix also cites so-called disparity studies commissioned by various state and local governments that claim to prove through statistical analysis that minority contractors endure discrimination. *See id.* at 509 ("Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.") (plurality opinion). All too often, however, disparity studies are badly flawed. *See* U.S. General Accounting Office, *Disadvantaged Business Enterprises* 29 (June 2001) ("[O]ur review of the 14 disparity studies [specific to transportation contracts] found that the limited data used to calculate disparities, compounded by methodological weaknesses, create uncertainties about the studies' findings. * * * While not all studies suffered from every problem, each suffered from enough problems to make its findings questionable."). And even if all of the studies in the Appendix were valid, proof of discrimination in isolated or scattered jurisdictions does not provide a sufficient basis to authorize or require each and

every state to implement racial and gender preferences on a coast-to-coast basis. *See Croson*, 488 U.S. at 505 (rejecting the suggestion "that findings of discrimination may be 'shared' from jurisdiction to jurisdiction * * *. We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another."). The Appendix does not cite a disparity study that is *national* in scope, as there is no national market for most government contracts.

On top of all this, there has been no showing that when Congress enacted TEA-21 it actually relied upon, or even considered, the Appendix materials. TEA-21 itself contains no relevant findings, and it is not clear what evidence, if any, Congress relied upon in enacting the race- and gender-based 10% set aside in the statute. As nine Members of the House Committee on Transportation and Infrastructure, the committee out of which TEA-21 was reported, noted:

> No evidence has been presented to this Committee that actual discrimination has occurred within the transportation construction industry. * * * No evidence has been presented justifying the use of the program on a nationwide basis. No statistical evaluations have been presented justifying the use of the program in any given market. [H.R. Rep. No. 105-467, at 500 (1998) (additional views).]

B. The Eighth Circuit Erred In Permitting Racial Preferences In Nebraska Without Requiring Strong Evidence Of Discrimination In Nebraska.

Having found that Congress had a strong basis in evidence "nationwide," the Eighth Circuit held that Congress could authorize or require racial preferences in each of the 50 states "even if the evidence did not come from or apply to every State or locale in the Nation." App. 8a. Thus, in upholding the DOT DBE program as implemented by Nebraska the court required no proof that "the record before Congress in-

cluded strong evidence of discrimination in construction contracting *in* * * * *Nebraska*." App. 8a (emphasis in original).

That holding cannot be squared with *Croson*, which struck down the City of Richmond's 30% set aside for minority subcontractors. Defending the need for its program, Richmond pointed to congressional findings "that there had been nationwide discrimination in the construction industry." *Croson*, 488 U.S. at 504. But this Court rejected that defense and said that "[t]he probative value of these findings for demonstrating the existence of discrimination *in Richmond* is extremely limited." *Id.* (emphasis added).

If Nebraska had enacted a DBE program entirely on its own and without federal involvement (which it has not), there is no doubt that it would have had to muster strong evidence of discrimination *in Nebraska*. *See id.* at 504 (requiring "Richmond [to] identify the discrimination it seeks to remedy in its own jurisdiction"); *Concrete Works of Colo., Inc.* v. *City & County of Denver, Colo.*, 540 U.S. ___ (2003) (Slip Op. at 5) ("To be crystal clear: Denver *cannot* meet its burden without proving that there was pervasive racial discrimination in the *Denver* construction industry.") (Scalia, J., dissenting from the denial of certiorari) (second emphasis added). The decision below, however, holds that the evidence before Congress that discrimination is a *national* problem was sufficient to permit Congress to authorize or require every state to implement racial preferences—even though that very same evidence would not be enough for a state to enact a non-federal program of its own. This is bootstrapping. *Cf. Croson*, 488 U.S. at 518 ("The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me") (Kennedy, J., concurring in part and concurring in the judgment).

Here, however, the division head of NDOR's construction office that administers NDOR's construction contracts testified that he was not able to identify any instance in which Nebraska or NDOR had discriminated against Nebraska DBEs. *See* Trial Tr. 935. Nor could he identify any instance in which a prime contractor had discriminated against a subcontractor in Nebraska on the basis of race or gender. *See id.* And as noted above, NDOR has admitted in this case that it is not aware of any governmental discrimination against DBEs in recent years. *See supra* at 10-11 (citing Defs.' Resp. to Plfs.' First Request for Admissions 1-2).

C. The Eighth Circuit Erred In Finding The DBE Program Narrowly Tailored As Applied In Nebraska.

The Eighth Circuit held in this case that Gross Seed "failed to prove that the revised DBE program is not narrowly tailored as applied in Nebraska." App. 14a. Although the legal principle on which the court based that holding is unclear from the single paragraph the court wrote on the subject, the court placed great weight on the fact that for Fiscal Year 2001 NDOR had set its overall goal for DBE participation and its projection of the percentage of DBE participation achievable through race- and gender-neutral means based on the recommendations of MGT of America, Inc., which NDOR had commissioned to study the "availability and capability" of DBEs in Nebraska. App. 14a.

Unlike a disparity study, the study MGT performed was not intended to, and did not purport to, prove discrimination against DBEs. *See* Trial Tr. 954 (MGT did not "look for specific instances of discrimination or discrimination at all"); *id.* at 1156 (MGT's study did not conclude "that there is a disparity in the award of NDOR's subcontracts between DBEs and non-DBEs"). Instead, MGT's assignment was to assess DBE "availability and capability." (In fact, however, MGT did not measure DBE capacity. *See id.* at 1152.) What MGT found was "an *overutilization* of DBE subcontractors"

and "an *overutilization* of DBEs" when DBE prime contractors and subcontractors are combined. *Id.* at 1157 (emphases added). MGT did find an underutilization of DBE prime contractors, but one cannot infer discrimination from that finding, as MGT itself did not. *See id.* at 1156 (MGT did not conclude that "the reason for that underutilization of DBE prime contractors was due to discrimination").

Accordingly, that NDOR relied upon the work of MGT does not demonstrate that the Nebraska DBE program is narrowly tailored. Because MGT failed to identify the scope of the problem (if any) in Nebraska, one cannot say that the racial and gender preferences used in Nebraska are narrowly tailored. *Cf. Croson*, 488 U.S. at 507 ("[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.").

III. THE EIGHTH CIRCUIT'S DECISION IN THIS CASE IS INCONSISTENT WITH THE FEDERAL CIRCUIT'S *ROTHE* DECISION.

The decision below is at odds with *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001). *Rothe*, like this case, involved a Fifth Amendment challenge to a federal racial contracting preference ("the 1207 program"). And like TEA-21, the statutes creating the 1207 program incorporated the Small Business Act's race-based presumption that certain racial groups are disadvantaged. *See id.* at 1314 ("Under the Act, five groups (comprising thirty-seven subgroups) * * * are presumed to be socially and economically disadvantaged.").

The District Court in *Rothe* granted summary judgment in favor of the government, but the Federal Circuit held that the lower court had erred in "apply[ing] to federal programs a watered-down version of strict scrutiny." *Id.* at 1321. The Federal Circuit explained that "Congress is entitled to no deference in determining whether Congress had a compelling

interest in enacting the racial classification," but the District Court had failed to "undertake the same kind of detailed, skeptical, non-deferential analysis undertaken in *Croson*." *Id.* The Federal Circuit stated that judicial review of federal racial preferences "must not result in a lesser degree of scrutiny than was required by the Court in *Croson*. Strict scrutiny is a single standard." *Id.* at 1321-22. *See also id.* at 1329 ("Congress' decision to enact race-based legislation must be reviewed under the same, non-deferential analysis that applies to state or municipal racial classifications.").

The Federal Circuit further explained that the District Court had failed to determine, among other things, (1) "whether evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to *all five* purportedly disadvantaged racial groups included under the 1207 program"; (2) "whether discriminatory conduct or effects were experienced in the *specific industry*" at issue in that case (i.e., "business services" or "computer maintenance and repair services"); and (3) "whether the evidence before it is sufficiently *timely* * * * to properly support the program's constitutionality," since "much of the evidence referenced by the district court was more than a decade old by the time of the 1207 program's reauthorization in 1992." *Id.* at 1330 (emphases added). The Federal Circuit insisted that these determinations be made because of *Croson*'s admonition that "[p]roper findings * * * are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." 488 U.S. at 510 (plurality opinion). *See Rothe*, 262 F.3d at 1329.

The Eighth Circuit here committed the errors of the *Rothe* District Court. The court did not apply a detailed and skeptical *Croson* analysis to determine if Congress had a strong basis in evidence for the racial preference it enacted but instead applied a deferential, "watered-down version of strict scrutiny." If Nebraska had enacted a state-wide DBE program based on the evidence before Congress, that pro-

gram would surely be unconstitutional under *Croson*. But the Eighth Circuit held that the same evidence allows Congress to authorize or require Nebraska to adopt a DBE program. Thus, the court below watered down *Croson* for its review of a federal program implemented by a specific state.

Nor did the Eighth Circuit make (or require the District Court to make) any of the determinations upon which the Federal Circuit insisted. Neither of the courts below determined (1) whether the evidence before Congress justified remedial preferences for Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent Asian Americans (to say nothing of the nearly 40 subgroups listed in 49 C.F.R. § 26.5)—*and women*, who are also presumed to be disadvantaged; (2) whether discrimination exists in the highway landscaping or seeding businesses; or (3) whether the congressional hearings and reports cited in the Appendix—some of which date as far back as the 1970s—remain probative of discrimination today. Thus, it is clear that the Federal Circuit's application of strict scrutiny to federal racial contracting preferences is much more strict (and appropriately so) than that applied by the Eighth Circuit in this case.

Because the Eighth Circuit's decision in this case is inconsistent with *Rothe*, this Court's review of the decision below is warranted. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED.

This case is perfectly suited to resolve the important constitutional issues raised by Gross Seed.

First, this case comes to the Court on fully developed factual record. The District Court conducted a seven-day bench

trial at which 11 witnesses were called and 174 exhibits introduced into evidence. App. 16a. Following the trial, the court issued an opinion identifying stipulated facts and controverted issues and setting forth the court's findings of fact and conclusions of law. App. 15a-27a.

Second, all of the necessary governmental actors are parties to this case. On the federal side, the United States Department of Transportation, its Federal Highway Administration, and the United States itself are respondents in this Court. On the state side, both the Nebraska Department of Roads and its Director are respondents. *See supra* at ii.

Third, both courts below held that Gross Seed has Article III standing to seek forward-looking relief. *See* App. 21a ("[T]he plaintiff has standing to challenge TEA-21, its implementing regulations, and the Nebraska Department of Roads program adopted pursuant to the regulations."); App. 3a ("[T]he district court held that the subcontractor plaintiff has standing to assert its constitutional claims. We agree.") (footnote omitted). As the Eighth Circuit explained, Gross Seed has the necessary standing because "[t]he stipulated facts demonstrate that * * * Gross Seed ha[s] bid on federally assisted highway projects in the past, will continue to bid in the future, and suffer competitive harm when contracts are awarded to others under DOT's [DBE] program." *Id.* (citing *Adarand* v. *Peña*, 515 U.S. at 211-212).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1665

SHERBROOKE TURF, INC.,

Plaintiff-Appellant,

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, ET AL.,

Defendants-Appellees,

UNITED STATES OF AMERICA, ET AL.,

Intervenor Defendant Appellees.

Appeal from the United States District Court
for the District of Minnesota

No. 02-3016

GROSS SEED COMPANY,

Plaintiff-Appellant,

v.

NEBRASKA DEPARTMENT OF ROADS, ET AL.,

Defendants-Appellees,

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Intervenor Defendant Appellees.

Appeal from the United States District Court
for the District of Nebraska

Submitted: May 15, 2003
Filed: October 6, 2003

Before LOKEN, Chief Judge, FAGG and MURPHY, Circuit Judges.

LOKEN, Chief Judge.

Since 1982, the federal highway statutes have required that ten percent of federal highway construction funds be paid to small businesses owned and controlled by "socially and economically disadvantaged individuals," as that term is defined in § 8(d) of the Small Business Act (15 U.S.C. § 637). *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100. Two non-minority contractors filed these separate actions challenging the current statute and Department of Transportation (DOT) regulations, as implemented in Minnesota and Nebraska. In the Minnesota action, plaintiff Sherbrooke Turf, Inc. ("Sherbrooke"), sued the Minnesota Department of Transportation (MnDOT) and its Commissioner to enjoin this aspect of the State's federally-assisted highway program. In the Nebraska action, plaintiff Gross Seed Company ("Gross Seed") sued the Nebraska Department of Roads (NDOR) and its Direc-

tor.[1] In each case, with the constitutionality of a federal statute at issue, the United States and DOT intervened as additional defendants. In the Minnesota action, the Associated General Contractors of America and its Minnesota affiliate appeared as amicus on behalf of plaintiff Sherbrooke.

Sherbrooke and Gross Seed provide landscaping services to prime contractors on federally assisted highway projects. In each lawsuit, the district court[2] held that the subcontractor plaintiff has standing to assert its constitutional claims. We agree. The stipulated facts demonstrate that Sherbrooke and Gross Seed have bid on federally assisted highway projects in the past, will continue to bid in the future, and suffer competitive harm when contracts are awarded to others under DOT's Disadvantaged Business Enterprises (DBE) program. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211-12 (1995). Turning to the merits, the district courts concluded that the DBE program as implemented in Minnesota and Nebraska satisfies strict scrutiny review, both facially and as applied, as the Tenth Circuit concluded following the Supreme Court's remand in *Adarand*. *Adarand Constructors, Inc v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (*Adarand II*), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). Sherbrooke and Gross Seed appeal, arguing the district courts erred in concluding that the federal DBE program satisfies strict scrutiny and in

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[1] Eleventh Amendment immunity may bar the claims against MnDOT and NDOR, which are state agencies, but the state officials may be sued for injunctive relief. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66-67, 71 n.10 (1989).

[2] In the Minnesota action, the HONORABLE JAMES M. ROSENBAUM, Chief Judge of the United States District Court for the District of Minnesota. In the Nebraska action, the HONORABLE LYLE E. STROM, United States District Judge for the District of Nebraska.

concluding that Minnesota and Nebraska need not establish that their implementation of the DBE program survives independent strict scrutiny review as well. We affirm.

I. The Legislative Background.

Prior to the 1982 statute designating ten percent of federal highway funds for minority small business contractors, a comparable provision in the Public Works Employment Act of 1977 was upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). However, the constitutionality of mandatory set-asides based on racial factors was placed in doubt by later Supreme Court's decisions -- *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 498-99 (1989), which struck down the City's thirty percent set-aside for minority small businesses, and *Adarand*, which held that all government race-based classifications are subject to strict judicial scrutiny. 515 U.S. at 235. Following *Adarand*, the District of Minnesota invalidated the statutory ten percent set-aside of federal highway funds and DOT's then-existing regulations, "as applied to highway construction contracts in the State of Minnesota." *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1037-38 (D. Minn. 1998). As a result, the DBE program was suspended in Minnesota in 1999.

In the wake of these judicial decisions, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which continued the ten percent designation subject to DOT implementation. Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113. DOT then promulgated the new implementing regulations here at issue in 49 C.F.R. pt. 26. *See* 64 Fed. Reg. 5096 (Feb. 2, 1999).

The revised DBE program provides contracting advantages to small businesses owned and controlled by "socially and economically disadvantaged individuals." "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). "Economically dis-

advantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). In determining whether a contractor qualifies as a DBE, grantee States must employ a rebuttable presumption that women and members of most racial minority groups are socially and economically disadvantaged. *See* TEA-21, § 1101(b)(2)(B), 112 Stat. at 113, incorporating 15 U.S.C. § 637(d)(3)(C) and 13 C.F.R. § 124.103(b). An individual whose personal net worth exceeds $750,000 is not economically disadvantaged. *See* 49 C.F.R. § 26.67(b). Small businesses do not qualify if their earnings exceeded $16.6 million per year in the previous three fiscal years. TEA-21 § 1101(b)(2)(A), 112 Stat. at 113.

II. Strict Scrutiny Review.

Sherbrooke and Gross Seed contend that the federal highway DBE program, on its face and as applied in Minnesota and Nebraska, violates the equal protection component of the Fifth Amendment's Due Process Clause. *Adarand* established that a federal program employing race-based classifications or remedies "must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227.[3] Though the DBE program confers benefits on "socially and economically disadvantaged individuals," a term that is facially race-neutral, the government concedes that the program is subject to strict

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[3] Although TEA-21 is in part an exercise of Congress's power under the Spending Clause, that does not affect the constitutional analysis. "Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment." *Fullilove*, 448 U.S. at 480 (plurality opinion); *see United States v. Am. Library Ass'n, Inc.*, 123 S. Ct. 2297, 2303 (2003).

judicial scrutiny, no doubt because the statute employs a race-based rebuttable presumption to define this class of beneficiaries and authorizes the use of race-conscious remedial measures. *See Adarand*, 515 U.S. at 212-13.[4] Thus, the statute's race-based measures "are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337-38 (2003). The Court has cautioned courts conducting this review that strict scrutiny is rigorous but not always "fatal in fact." *Adarand*, 515 U.S. at 237 (quotation omitted).

A. Compelling Governmental Interest.

To survive strict scrutiny, the government must first articulate a legislative goal that is properly considered a compelling government interest. Neither Sherbrooke nor Gross Seed challenges the district courts' conclusion that Congress and DOT acted to further a compelling interest. As the Tenth Circuit said in *Adarand II*, "we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." 228 F.3d at 1165; *accord Croson*, 488 U.S. at 492.

In addition to identifying a compelling government interest, the government must demonstrate a "strong basis in the evidence" supporting its conclusion that race-based remedial action was necessary to further that interest. "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. Sherbrooke and Gross Seed argue that Congress

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[4] However, the fact that the program is tailored to disqualify minority-owned enterprises that are not truly disadvantaged is relevant to the narrow-tailoring aspect of strict scrutiny analysis. *Cf. Adarand*, 515 U.S. at 259-62 (Stevens, J., dissenting).

lacked strong evidence supporting its conclusion that race-based classifications and remedial measures were necessary. They argue that, in enacting TEA-21, Congress had no "hard evidence" of widespread intentional race discrimination in the contracting industry, relying instead on misrepresentations contained in "Appendix I," a Department of Justice summary of more than fifty documents and thirty congressional hearings on minority-owned businesses prepared in response to the *Adarand* decision. *See Appendix -- The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26050 (May 23, 1996). Sherbrooke and Gross Seed point to Government reports and their own expert's report questioning the persistence of racial discrimination in highway construction and argue that we must conduct a de novo review of this legislative record.

We agree we must take a hard look at the evidence, and we have done so. We conclude that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand II*, 228 F.3d at 1167-76. As the Tenth Circuit's analysis demonstrates, Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry. In rebuttal, Sherbrooke and Gross Seed presented evidence that the data was susceptible to multiple interpretations, but they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. Thus, they failed to meet their ultimate burden to prove that the DBE program is unconstitutional on this ground. *See Rothe Dev. Corp. v. U.S. Dep't of Def.*, 262 F.3d 1306, 1317 (Fed. Cir. 2001).

Finally, Sherbrooke and Gross Seed argue that MnDOT and NDOR must independently satisfy the compelling gov-

ernment interest aspect of strict scrutiny review. Under the prior law -- when the ten percent federal set-aside was more mandatory and *Fullilove*, not strict scrutiny, provided the governing constitutional principle -- the Seventh Circuit held that a contractor who conceded the validity of the federal program could not challenge a grantee State for "merely complying with federal law." *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 423 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991); *accord Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 57 (2d Cir. 1992); *Ellis v. Skinner*, 961 F.2d 912, 915 (10th Cir.), *cert. denied*, 506 U.S. 939 (1992); *Tenn. Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991). Based on this precedent, the government argues, and the district courts agreed, that participating States need not independently meet the strict scrutiny standard because under the revised DBE program the State must still comply with the DOT regulations. Sherbrooke and Gross Seed respond that the prior cases are distinguishable, and Minnesota and Nebraska DBE programs must independently satisfy strict scrutiny under *Croson*, because the present TEA-21 regime "is characterized by state discretion throughout." This issue was not addressed by the Tenth Circuit in *Adarand II*.

We conclude that neither side's position is entirely sound. Compelling government interest looks at a statute or government program on its face. When the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation. Thus, we reject appellants' contention that their facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting *in Minnesota and Nebraska*. On the other hand, a valid race-based program

must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis.

B. Is the Revised DBE Program Narrowly Tailored?

In addition to determining that a race-based measure serves a compelling government interest, a reviewing court applying strict scrutiny must determine if the measure is narrowly tailored, that is, whether "the means chosen to accomplish the government's asserted purpose [are] specifically and narrowly framed to accomplish that purpose." *Grutter*, 123 S. Ct. at 2341 (quotation omitted). Sherbrooke and Gross Seed have the ultimate burden of establishing that the DBE program is not narrowly tailored. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 293 (1986) (O'Connor, J., concurring); *Rothe*, 262 F.3d at 1317. While our compelling interest analysis focused on the record before Congress, the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

1. Appellants' facial challenge to the DBE program requires us to look carefully at DOT's regulations to determine whether they may be constitutionally applied under any set of factual circumstances. *See United States v. Salerno*, 481 U.S. 739, 746 (1987) (standard for facial challenges). In determining whether a race-conscious remedy is narrowly tailored, we look at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *See United States v. Paradise*, 480 U.S. 149, 171, 187 (1987) (plurality and concurring opinions).

Under the revised DBE program, a State receiving federal highway funds must, on an annual basis, submit to DOT an overall goal for DBE participation in its federally funded highway contracts. *See* 49 C.F.R. § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 C.F.R. § 26.45(b). The number may be adjusted upward to reflect the State's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See* 49 C.F.R. § 26.45(d). The State must meet the "maximum feasible portion" of its overall goal through race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See* 49 C.F.R. § 26.51(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the State must give preference to firms it has certified as DBEs. However, such preferences may not include quotas, and set-aside contracts are limited to those instances "when no other method could be reasonably expected to redress egregious instances of discrimination." 49 C.F.R. § 26.43(b). During the course of a year, if a State determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 C.F.R. § 26.51(f).

The regulations expressly declare that the statutory ten percent provision "is an aspirational goal at the national level," not a mandatory requirement for grantee States. 49 C.F.R. § 26.41(b). Thus, absent bad faith administration of the program, a State's failure to achieve its overall goal will not be penalized. *See* 49 C.F.R. § 26.47. If the State meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual overall goal until it does not meet its prior overall goal for a year. *See* 49 C.F.R.

§ 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any or all requirements of the program. *See* 49 C.F.R. § 26.15(b).

Like the district courts, we conclude that the DOT regulations, on their face, satisfy the Supreme Court's narrow tailoring requirements. First, the regulations place strong emphasis on "the use of race-neutral means to increase minority business participation in government contracting." *Adarand*, 515 U.S. at 237-38 (quotation omitted). "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but it does require "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 123 S. Ct. at 2344-45. The regulations also prohibit the use of quotas and severely limit the use of set-asides. *See Croson*, 488 U.S. at 496 (discussing quotas).

Second, the revised DBE program has substantial flexibility. A State may obtain waivers or exemptions from any requirement and is not penalized for a good faith failure to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000 cannot qualify as economically disadvantaged. *See* 49 C.F.R. § 26.67(b). Likewise, the DBE program contains built-in durational limits. A State may terminate its DBE program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 C.F.R. § 26.51(f)(3). Moreover, TEA-21 is subject to periodic congressional reauthorization. Periodic legislative debate "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Grutter*, 123 S. Ct. at 2346 (quotation omitted).

Third, DOT has tied the goals for DBE participation to the relevant labor markets. The regulations require grantee States to set overall goals based upon the likely number of minority contractors that would have received federally as-

sisted highway contracts but for the effects of past discrimination. *See* 49 C.F.R. § 26.45(c)-(d) (Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. This stands in stark contrast to the program struck down in *Croson*, which "rest[ed] upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (quotation omitted).

Finally, Congress and DOT have taken significant steps to minimize the race-based nature of the DBE program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a rebuttable presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage. Thus, race is made relevant in the program, but it is not a determinative factor. *See Grutter*, 123 S. Ct. at 2345-46; *Gratz v. Bollinger*, 123 S. Ct. 2411, 2429 (2003) (criticizing a University of Michigan program that automatically awarded twenty points to minority applicants, without individualized consideration).

For these reasons, we agree with the district courts that the revised DBE program is narrowly tailored on its face.

2. Sherbrooke and Gross Seed also argue that the revised DBE program as applied in Minnesota and Nebraska is not narrowly tailored. As noted previously, because the revised DBE program affords grantee States substantial discretion, this contention requires us to examine the program as implemented by those States. Under the revised federal program, States "set their own goals, based on local market conditions; their goals are not imposed by the federal government nor do

recipients have to tie them to any uniform national percentage." 64 Fed. Reg. at 5102.

Minnesota. Following promulgation of the current DOT regulations, MnDOT commissioned National Economic Research Associates (NERA) to study the highway contracting market in Minnesota. NERA first determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in the highway construction market. *See* 49 C.F.R. § 26.45(c) (Step 1). Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, NERA next estimated that the number of participating minority-owned businesses would be 34 percent higher in a race-neutral market. Therefore, NERA adjusted its DBE availability figure from 11.4 to 11.6 percent. *See* 49 C.F.R. § 26.45(c) (Step 1). Based on NERA's study, MnDOT adopted an overall goal of 11.6 percent DBE participation for federally assisted highway projects in fiscal year 2001. MnDOT predicted that it would need to meet nine percent of that overall goal through race- and gender-conscious means, based on the fact that DBE participation in state highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999, when its previous DBE program was suspended by the district court's injunction in *Sherbrooke*. To meet its overall goal, MnDOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs. MnDOT determines that portion based on several individualized factors, including the availability of DBEs and the extent of subcontracting opportunities on the project.

DOT approved this MnDOT program for Fiscal Year 2001. Sherbrooke presented evidence attacking the reliability of the data NERA used in determining its recommended overall goal. But Sherbrooke failed to establish that better data was available or that MnDOT was otherwise unreasonable in undertaking this thorough analysis and in relying on its results. The precipitous drop in DBE participation in 1999, when no

race-conscious methods were employed, supports MnDOT's conclusion that a substantial portion of its 2001 overall goal could not be met with race-neutral measures, and there is no evidence that MnDOT failed to adjust its use of race-conscious and race-neutral methods as the year progressed, as the DOT regulations require. On this record, we agree with the district court that the revised DBE program serves a compelling government interest and is narrowly tailored, on its face and as applied in Minnesota. Accordingly, the court properly granted summary judgment dismissing Sherbrooke's claims.

Nebraska. To implement the revised federal DBE program, NDOR commissioned MGT of America, Inc., to conduct availability and capability studies of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the then-mandatory ten percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.67 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, MGT recommended that NDOR set an overall goal of 9.95 percent DBE participation and predict that 4.82 percent of this overall goal would have to be achieved by race- and gender-conscious means. NDOR adopted these recommendations in its submission to DOT for Fiscal Year 2001. NDOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. DOT approved this NDOR program for fiscal year 2001. Having carefully reviewed the trial record, we conclude that Gross Seed, like Sherbrooke, failed to prove that the revised DBE program is not narrowly tailored as applied in Nebraska. Accordingly, the district court properly entered post-trial judgment dismissing Gross Seed's claims.

The judgments of the district courts are affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GROSS SEED COMPANY, a Nebraska corporation,	)	
Plaintiff,	)	4:00CV3073
v.	)	
NEBRASKA DEPARTMENT OF ROADS, and JOHN L. CRAIG, in his capacity as the Director of the Nebraska Department of Roads;	)	MEMORANDUM OPINION
Defendants,	)	
UNITED STATES DEPARTMENT OF TRANSPORTATION; and FEDERAL HIGHWAY ADMINISTRATION,	)	
Intervenors.	)	

Filed May 6, 2002

This matter came on for trial to the Court commencing June 18, 2001, and concluding on June 26, 2001. The parties submitted post-trial briefs and the matter is now ready for decision. Pending at the time of the trial was the Federal de-

fendants' motion for summary judgment (Filing No. 85). That motion will be denied as moot.

Having considered the evidence, consisting of the testimony of eleven witnesses and 174 exhibits, the respective trial and post-trial briefs of the parties, the Court, pursuant to Fed.R.Civ.P. 52, now makes the following findings of fact and conclusions of law.

BACKGROUND

Stipulated facts:

In the pretrial order (Filing No. 138), the parties agreed that the following facts may be accepted as established for the purposes of this case:

1) Plaintiff Gross Seed Company is a Nebraska corporation specializing in landscaping, which regularly bids on federally assisted highway construction contracts. Gross Seed Company bids on highway construction contracts both as a prime and subcontractor.

2) Defendant John L. Craig is Director of the Nebraska Department of Roads (NDOR).

3) John Gross, a white male, is the President of Gross Seed Company and owns 50% of its issued stock.

4) Peggy L. Gross, the wife of John Gross and a Director of Gross Seed Company, owns 50% of the issued stock in that company. Ms. Gross is also the owner of North Central Contracting, an entity certified as a Disadvantaged Business Enterprise (DBE) in Nebraska and South Dakota.

5) On June 9, 1998, the President signed into law the Transportation Equity Act for the 21st Century (TEA-21), Pub.L. 105-178, 112 Stat. 107 (1998), the current U.S. Department of Transportation (DOT) authorization Act for federal highway transit programs.

6) Section 1101(b) of TEA-21[1] reauthorized the Disadvantaged Business Enterprise (DBE) program that had been established in earlier DOT statutory provisions.[2]

7) DOT adopted a new regulatory program implementing the DBE provisions of TEA-21 that was published at 64 Fed. Reg. 5095, *et seq.*, (February 2, 1999) and is codified at 49 C.F.R. Part 26. These DBE regulations took effect on February 2, 1999.

8) Under 49 C.F.R. Part 26, recipients of federal aid highway funds such as NDOR are required as a condition of receiving such funds to adopt a DBE program consistent with the requirements of Part 26 and to submit that program to the DOT for its review and approval.

9) A requirement of the DOT DBE program is that recipients, such as NDOR, establish an annual or overall goal for participation in DOT-assisted contracts.

10) 49 C.F.R. Part 26 provides that whenever possible, recipients of TEA-21 federal highway funds must attempt to meet their overall goals for DBE participation through race and gender-neutral means.

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[1] Section 1101(b) (1) of TEA-21 provides in part, as follows: ("Except to the extent the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under [the Act] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." Section 1101(b) also states that women and members of minority groups identified in 8(d) of the Small Business Act are presumed to be socially and economically disadvantaged for purposes of the Disadvantaged Business Enterprise (DBE) Program.

[2] *See, e.g.*, § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub.L. No. 102-240, 105 Stat. 1914; § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub.L. No. 100-17, 101 Stat. 132.

11) NDOR is now and at all relevant times has been a recipient to federal-aid highway funds authorized by TEA-21.

12) NDOR conducted an analysis to establish an overall goal for the DBE participation.

13) NDOR established an overall goal for Fiscal Year 2000 of 11% and stated its intent to meet approximately 21% of that goal (i.e., a total of 2.33% overall) through race- and gender-neutral methods.

14) DOT approved NDOR's methodology for establishing its overall goal for DBE participation on federally-assisted contracts and the portion to be achieved through race- and gender-neutral means on March 20, 2000, pursuant to 49 C.F.R. § 26.51(c).

15) On October 30, 2000, based on an availability study conducted by a consultant, MGT of America, NDOR submitted to DOT a proposed overall goal of 9.95% for fiscal year 2001, with a race- and gender-conscious goal of 4.82% and a race- gender-neutral goal of 5.13% DOT currently is reviewing that proposed goal.

16) DOT has approved use of NDOR's proposed DBE goals for fiscal year 2001, pending completion of its review of those goals.

Controverted issues

In the pretrial order, the parties agreed that the following were the issues remaining to be determined and resolved by the Court:

1) Whether the DBE program authorized by TEA-21 is narrowly tailored to satisfy a compelling government interest.

2) Whether the regulations set forth in 49 C.F.R. Part 26 are narrowly tailored to satisfy a compelling government interest.

3) Whether the Nebraska Department of Roads' DBE Program is narrowly tailored to satisfy a compelling government interest.

4) Whether the DBE provisions set forth in TEA-21 are an unlawful and improper exercise of Congress' powers under the United States Constitution.

5) Whether the gender-conscious provisions of the DBE program authorized by TEA-21 are substantially related to the achievement of important governmental objectives.

6) Whether the plaintiff has standing.

BACKGROUND

In June of 1998, Congress enacted the Transportation Equity Act for the 21st Century (TEA-21). Pub.L. No. 105-178, 112 Stat. 107 (1998). TEA-21 provides for the participation of disadvantaged business enterprises in federally funded highway programs. Pursuant to the statute, regulations were promulgated by the United States Department of Transportation (USDOT) for its enforcement. 49 C.F.R. Part 26 (2000).

Generally, TEA-21 provides that "not less than 10 percent" of the federal funds expended under the statute should be used for the services of socially and economically disadvantaged businesses. The statute refers to the Small Business Act to define socially and economically disadvantaged individuals to include women, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act. 15 U.S.C. § 637(d)(1) and (3)(C) and (D).

The regulations require States to implement a Disadvantaged Business Enterprise (DBE) program to obtain federal financial assistance for state highway projects. 49 C.F.R. § 26.1. The state must then submit the plan to the USDOT for approval. A state may obtain a waiver of the requirement if the state demonstrates it can reach a level playing field for

DBE's without the implementation of the program. 49 C.F.R. § 26.15.

The Nebraska Department of Roads (NDOR) adopted a program pursuant to the regulations and established an overall goal for fiscal year 2001 of 9.95% (DBE) participation in federally assisted highway projects (See Exhibits 201, 202 and 203). Based upon a disparity study conducted by MGT of America (Exhibit 202), NDOR submitted that it could reach 5.13% by race and gender-neutral measures, and the other 4.82% by race and gender-conscious means. The US-DOT approved the proposed goal. The other provisions relating to the program will be addressed in the following discussion.

The plaintiff in this case is a company which is 50% owned by a white male, John C. Gross. Mr. Gross also testified that he is the president of the company and that he controls all the general matters of the business (Tr. 1369-70). The plaintiff does not qualify as a socially and economically disadvantaged business under TEA-21, its implementing regulations, or NDOR's DBE program.

DISCUSSION

I. Standing.

The first issue to be resolved is the State defendants' contention that plaintiff does not have standing to maintain this action seeking forward-looking relief. In the second amended complaint (Filing No. 66), plaintiff states that he is seeking "a permanent injunction against enforcement and a declaration of unconstitutionality of § 1101(b) of the Transportation Equity Act for the 21st Century, Pub.L. 105-178 (hereinafter TEA-21), 49 C.F.R. Part 26, and the Nebraska Department of Roads Disadvantaged Business Enterprises (DBE) program, which, facially and as applied, discriminate on the basis of race and gender in the award of federal-aid highway contracts in Nebraska.

Jurisdiction is premised on 28 U.S.C. § 1331(a) and pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and pursuant to 28 U.S.C. § 1343(a)(3) and (4). *See also* 5 U.S.C. § 702 and 28 U.S.C. § 1347. Venue is appropriate pursuant to 28 U.S.C. § 1391.

The State defendants argue in their brief that plaintiff has not alleged an "imminent" injury. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (*Adarand III*), the United States Supreme Court addressed the plaintiff's claim that the government program denied it equal protection of the laws, thus requiring an injunction against the enforcement of the statute. Specifically, the Supreme Court examined whether the plaintiff "made an adequate showing that some time in the relatively near future, it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Adarand III*, 515 U.S. at 211. The Supreme Court found that the plaintiff need not demonstrate that it will be a low bidder on the contract because the injury is the inability to compete on equal footing for the contract. *Id.*

The stipulated facts and the testimony of Mr. Gross at trial and by deposition establish that he not only has bid on federal highway work in Nebraska in the past but that he will continue to bid on the work. He stated that he bids as a subcontractor and on a limited basis as a prime contractor. This testimony is sufficient to demonstrate that the plaintiff has standing to challenge TEA-21, its implementing regulations, and the Nebraska Department of Roads program adopted pursuant to the regulations. *Adarand III*, *supra*.

II. Equal Protection.

While Congressional enactments are usually presumed constitutional, a statute which uses race-based classifications is presumed unconstitutional. *Personnel Adm'n v. Feeney*, 442 U.S. 256, 272 (1979). In *Adarand III*, the Supreme Court made clear that all classifications imposed by a government actor, based upon race, are to be analyzed under

strict scrutiny. *Adarand III*, 515 U.S. at 227. To be constitutional, such classifications must be narrowly tailored to further a compelling governmental interest. *Id.* at 227. Classifications based upon gender are subject to intermediate scrutiny. The Federal Defendants acknowledge the application of intermediate scrutiny to gender-based classifications. However, they suggest that the Court need not address the gender-based portions separately, as they will meet the more rigorous standard of strict scrutiny. The Court has concluded that both meet the strict scrutiny standard and so will discuss both classifications together.

In other words, the government must show the classification serves an important governmental interest and that the discretionary means are substantially related to serve that interest. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *In re Sherbrooke Sodding Co.*, 17 F.Supp.2d 1026, 1033 (D.Minn. 1998).

A. Racial and Gender Classification - Strict Scrutiny

1. Compelling Interest

The compelling interest prong of strict scrutiny has three parts. First, a court must determine whether the government has articulated a goal that is a "compelling interest" under the governing law. Next, the court must determine if actual evidence supports the goal. Finally, the court examines whether the challenger has rebutted the evidence submitted by the government.

Turning to the first prong, Congress stated that the DBE program of TEA-21 was necessary to remedy discrimination in the construction industry. H. Rep. 105-550. The United States Supreme Court has previously recognized that the government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of funds and in remediating the effects of past discrimination. *City of Richmond v. Croson*, 488 U.S. 469, 491-92 (1969).

Thus, the Court must determine whether actual evidence supports a finding of the existence of past discrimination.

The government also has a significant interest in remedying the effects of past discrimination based upon gender. *See United States v. Virginia*, 518 U.S. 515, 531 (1996) (stating that the Court has long recognized the history of sex discrimination in this country). *See also California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (holding that the government has an important governmental interest in promoting equal employment opportunities for women).

Ultimately, the Court must determine whether there is a strong basis in evidence for the conclusion that remedial action was necessary. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513, 1520 (1994). However, like the parties in *Concrete Works*, the parties in this case disagree as to what evidence the Court should examine to determine if there is a strong basis. *See Concrete Works*, 36 F.3d at 1520. In examining whether evidence supports a finding of discrimination to, in turn, support a compelling interest, the court may look at both statistical and anecdotal evidence. *Id.* at 1530. In addition, the Court should consider both direct and circumstantial evidence, including pre-enactment and post-enactment evidence. *Id.* Finally, public and private discrimination in both specific areas of government contracts and the construction industry generally, are relevant. *Id.*

Plaintiff suggests that even though Congress has studied and legislated on the need for this type of remedial legislation for many years, it is still necessary that the present record made by Congress to support TEA-21 must include the prior studies and debates conducted by and before Congress. The Supreme Court had recognized in *Fullilove v. Klutznick*, 448 U.S. 448, 503, 100 S. Ct. 2758, 65 L.Ed.2d 902 (1980) that "[a]fter Congress has legislated repeatedly in an area . . . that may reduce the need for fresh hearings and long debates. . . ." *See also Owen Okruhlick v. University of Arkansas*, 255 F.3d 615, 625 (8th Cir. 2001). That is the case here. Based on the

evidence presented and considering the history of this legislation, the Court finds that the federal government's evidence is sufficient to demonstrate past discrimination does exist in the construction industry. Furthermore, the Court finds that racial and gender discrimination within the construction industry is sufficient to demonstrate a compelling interest in individual areas, such as highway construction.

2. Narrowly Tailored

Next, the Court turns to the second prong of the strict scrutiny analysis -- narrow tailoring. In *United States v. Paradise*, 480 U.S. 149, 171 (1987), the United States Supreme Court articulated several factors to determine whether a race-conscious remedy is appropriate: "the necessity for relief and efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."

a. Necessity for Relief and Efficacy of Alternative Remedies

This factor requires the Court to determine if there has been inquiry into the use of race-neutral means to increase minority business participation. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-38 (1995). At trial, the Federal Defendants presented evidence that Congress, through extensive research and hearings, determined that race-neutral measures alone would not entirely remedy the problem of past discrimination. In implementing this legislation, the Department of Transportation has adopted rules governing participation by disadvantaged business enterprises in the Department's programs. *See* 49 C.F.R. Part 26. Section 26.51 which deals specifically with race neutral and race conscious means provides that participating states must meet the maximum feasible portion of their overall goal by using race-neutral means of facilitating DBE participation. Race conscious means must be used to meet that portion of the State's

goal not achieved through the use of race-neutral means. The evidence sufficiently demonstrates the necessity of the program as designed.

b. Flexibility and Duration of Relief

Flexibility largely depends upon the availability of waiver out of the discriminatory requirements, which is a part of TEA-21. 49 C.F.R. § 26.15. Plaintiff agrees with defendants that the federal program is flexible. A program must also have a limited duration.

A program which employs discriminatory practices must not last longer than necessary to eliminate the discrimination. *Adarand*, 515 U.S. at 273-38. TEA-21 and its implementing regulations expire in 2004, unless Congress reauthorizes the program. Prior to reauthorization, Congress must reevaluate to determine if the program is still necessary. Furthermore, internally, the federal program has salary caps. In other words, when an individual's net worth is over $750,000, the individual's company is no longer qualified as a DBE. For these reasons, the Court finds that this factor is met in this case.

c. Relationship of numerical goals to the relevant labor market

In *Croson v. City of Richmond*, the United States Supreme Court struck down a quota that "rest[ed] upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson v. City of Richmond*, 488 U.S. 469, 507 (1989). The Federal Defendants point to the necessity that a state set annual overall goals that reflect market conditions that would be achieved if discrimination was lacking.

An examination of the enabling statute and the regulations adopted by the United States Department of Transportation provide a reasonable means to address the discrimination

which congressional studies have found exist in the construction industry.

d. Impact of relief on Third Parties

Innocent persons may bear some burden of remedial measures to eradicate past discrimination. *Fullilove*, 448 U.S. at 484. However, the limit on this burden is found in the "good faith" provisions for contractors when contract goals are set. 49 C.F.R. § 26.53.

Having examined the legislative history and the regulations adopted by the Department of Transportation, the Court is satisfied that the evidence establishes a compelling interest for the adoption of TEA-21 and Part 26 of the Code of Regulations, 49 C.F.R. Part 26.

e. NDOR Program

The evidence clearly establishes that NDOR's DBE program (Exhibits 201, 202, and 203) was adopted to comply with 49 C.F.R. Part 26. The plaintiff suggests that the State independently establish that a compelling interest exists in Nebraska and that its program is narrowly tailored to meet that compelling interest. In *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transportation, supra*, Judge Rosenbaum articulately rejects this contention, citing *Milwaukee County Pavers Assoc. v. Fiedler*, 922 F.2d 429, 423 (7th Cir. 1991); *see also Ellis*, 961 F.2d at 916 (10th Cir. 1992); *Tennessee Asphalt Co. v. Farris*, 542 F.2d 696, 975 (6th Cir. 1991). When a state participates in a heavily regulated federal program, such as the DBE program, it is not necessary that it independently prove that its program meets the strict scrutiny standard. In *Milwaukee County Pavers Assoc.*, *supra*, at 424, the Court stated:

> Insofar as the State is merely doing what the statute and regulations envision and permit, the attack on the state is an impermissible collateral attack on the statute and its regulations.

For these reasons, the Court concludes that the State need not independently establish that its program meets strict scrutiny, and its program will be approved as the Court has found that TEA-21 and 49 C.F.R. Part 26 meet the requirements of strict scrutiny and are, therefore, constitutional. A separate judgment will be entered in accordance with this memorandum opinion.

DATED this 6th day of May, 2002.

BY THE COURT:

/s/

Lyle E. Strom, Senior Judge
United States District Court

(2)

No. 03-960

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

GROSS SEED COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND NEBRASKA DEPARTMENT OF ROADS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENTS, NEBRASKA DEPARTMENT OF ROADS AND JOHN L. CRAIG, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress in enacting the Transportation Equity Act for the 21st Century had a strong basis in evidence to authorize and require a 50-state program of racial and gender preferences as a putative remedy for discrimination in public contracting?

2. Whether the Disadvantaged Business Enterprise ("DBE") program of the United States Department of Transportation ("DOT") – which discriminates on the basis of race and gender in connection with the federal funding of highway construction contracts let by states – is narrowly tailored to further a compelling interest?

3. Whether Nebraska's DBE program which was required by DOT's DBE regulations and approved by DOT, satisfies strict scrutiny?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Gross Seed Company was the plaintiff-appellant in the court below. Respondents Nebraska Department of Roads; John L. Craig, in his capacity as the Director of the Nebraska Department of Roads; United States Department of Transportation; Federal Highway Administration; and the United States, were the defendants-appellees in the court below.

Respondent Nebraska Department of Roads is an administrative agency of the State of Nebraska, and as such has no parent corporations, and no publicly-held company owns 10 percent or more of its stock. John L. Craig is a defendant solely in his capacity as a Director of the Nebraska Department of Roads.

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The Opinion of the Eighth Circuit is reported at 345 F.3d 964 (2003) and reproduced in the Petitioners' Appendix at 1a. The Opinion of the District Court for the District of Nebraska is unreported and reproduced in the Petitioners' Appendix at 15a.

JURISDICTION

The Judgment of the Eighth Circuit was entered on October 6, 2003. The jurisdiction of the Eighth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves a set of federal statutes and regulations that constitute the Disadvantaged Business Enterprise ("DBE") program of the U.S. Department of Transportation ("DOT") and the Federal Highway Administration ("FHWA").

The DBE program was authorized by the Transportation and Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) ("TEA-21"), established by 49 C.F.R. Part 26 and administered in part by the State of Nebraska Department of Roads through its Director John L. Craig (collectively "NDOR"). Gross Seed challenged the DBE program, both facially and as applied, alleging that it violated its rights to equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution.

The DBE program established by the Federal Government requires NDOR to set an overall DBE goal. On a limited number of federal aid contracts, contractors must use good faith efforts to award a certain percentage of subcontracts to "socially and economically disadvantaged" businesses. Gross Seed is not a certified DBE and complains of the implementation of the DBE program by NDOR. The Eighth Circuit Court of Appeals, like the District Court, rejected Gross Seed's challenge following a thorough review.

1. NEBRASKA'S IMPLEMENTATION OF THE FEDERAL DBE PROGRAM.

NDOR was mandated by DOT and FHWA to implement a DBE program. As set forth in facts accepted by the Eighth Circuit and not excepted to by Gross Seed, NDOR commissioned MGT of America, Inc. ("MGT") to conduct availability and capability studies of DBE firms in the Nebraska highway construction market. The study was to aid NDOR in implementing the revised Federal DBE program. The availability study found that between 1995 and 1999 when Nebraska followed the mandatory ten percent set-aside requirement, 9.59 percent of all available and capable firms were DBEs and DBE firms received 12.67 percent of the contract dollars on federally-assisted projects. MGT recommended that NDOR set an overall Fiscal Year 2001 DBE participation bill of 9.95 percent and set the race- and gender-conscious part of the goal at 4.82 percent. NDOR adopted MGT's recommendations in its submission to DOT for Fiscal Year 2001. DOT approved NDOR's program for Fiscal Year 2001. For Fiscal Year 2001, NDOR required prime contractors to make a good

faith effort to allocate a set portion of each contract's funds to DBE sub-contractors. Pet. App. at 14a.

2. THE DISTRICT COURT PROCEEDINGS.

The Action was originally filed by Gross Seed on May 21, 2000. DOT and FHWA intervened in the District Court proceeding. Trial was held to the District Court commencing June 18, 2001, concluding June 26, 2001. During the trial, the District Court heard testimony from 11 witnesses and reviewed 174 Exhibits. Pet. App. at 15a-16a. Applying strict scrutiny, the District Court found that the Congressional basis for the DBE program under TEA-21 demonstrated a compelling interest. Pet. App. at 24a. The Court then turned to the second prong of the strict scrutiny analysis and found that the DBE program of TEA-21 was narrowly tailored. Pet. App. at 24a-26a. Finally, the Court concluded that NDOR need not independently establish that its program met strict scrutiny. Pet. App. at 27a.

3. THE EIGHTH CIRCUIT COURT OF APPEALS' REVIEW.

In a decision filed October 6, 2003, the Eighth Circuit, with the Honorable Chief Judge Loken presiding and joined by Judges Fagg and Murphy, affirmed the District Court's decision. With respect to the compelling governmental interest prong of the strict scrutiny analysis, the Eighth Circuit agreed with the Petitioner that it must, "[T]ake a hard look at the evidence, and we have done so." Pet. App. at 7a. After taking a hard look at the evidence, the Eighth Circuit concluded, "[T]hat Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated

by the Tenth Circuit in *Adarand II*, 228 F.3d at 1167-76." Pet. App. at 7a.

Turning to the second prong of the strict scrutiny analysis, the Eighth Circuit first addressed the facial challenge to the Federal DBE program using the narrow tailoring factors set forth in *United States v. Paradise*, 480 U.S. 149 (1987). The Eighth Circuit found that the regulations place strong emphasis on "the use of race-neutral means to increase minority business participation in government contracting" while at the same time the regulations prohibit the use of "quotas and severely limit the use of set-asides." Pet. App. at 11a. The Eighth Circuit then found that the revised DBE program has substantial flexibility. *Id*. The Court next found that the DOT has tied the goals for DBE participation to the relevant labor market. Pet. App. at 11a-12a. Finally, the Eighth Circuit found that Congress and DOT have taken significant steps to minimize the race-based nature of the DBE program. Pet. App. at 12a. The Eighth Circuit concluded that the revised DBE program is narrowly tailored on its face.

The Eighth Circuit then turned to the narrow tailoring prong as applied. After considering the facts set forth above, the Eighth Circuit concluded that Gross Seed failed to prove that the revised DBE program was not narrowly tailored as applied by NDOR. Pet. App. at 14a.

The Eighth Circuit, like the District Court, rejected Gross Seed's challenge to TEA-21, the Federal DBE regulations and Nebraska's implementation of its DBE program, both facially and as applied.

4. MISSTATEMENTS IN PETITIONER'S WRIT OF CERTIORARI.

The Petitioner makes several assertions regarding admissions made by NDOR in discovery responses and through the testimony of Claude Oie, the head of NDOR's Construction Office which is also responsible for the administration of NDOR's Disadvantaged Business Program. Trial Tr. 575:17-22; Petitioner's Writ at 11, 22. However, a closer review of Mr. Oie's trial testimony presents a more balanced picture to correct these blanket assertions which may be construed as misstatements of fact under Supreme Court Rule 15.2. At trial, Mr. Oie testified that the effects of discrimination in the contracting community in Nebraska are brought out in the fact that outside of the program the DBE community does not get as much work as they do when there are program goals. Trial Tr. 622:21-24. Stated another way, Mr. Oie testified that the fact that there is an availability of DBE's not getting the work on state-funded projects would be an indication of some discrimination. Trial Tr. 621:7-24. NDOR's position on the DBE program is that it is a regulatory requirement from DOT and NDOR will do everything it can to meet 49 C.F.R. Part 26. Trial Tr. 620:40-8. Mr. Oie testified that pursuant to 49 C.F.R. Part 26, NDOR was not to look for specific instances of discrimination. Trial Tr. 601:1-17. NDOR did not direct MGT to look for specific instances of discrimination since Congress had decided there was discrimination and NDOR was required by 49 C.F.R. Part 26 to have a DBE program. Trial Tr. 604:1-8; 605:2-17.

Petitioner's blanket statements regarding the lack of discrimination evidence in the Nebraska contracting community is contradicted by the testimony at trial.

Further, NDOR complied specifically with DOT's directive that it was not required to look for specific instances of discrimination in the highway contracting community. The totality of the evidence at trial was sufficient to convince the Eighth Circuit that NDOR had met its narrow tailoring requirement as argued below.

REASONS FOR DENYING THE WRIT

I. GROSS SEED'S CLAIM FOR FORWARD-LOOKING RELIEF SHOULD BE DENIED BECAUSE IT CHALLENGES A FISCAL YEAR 2001 NEBRASKA DBE PROGRAM UNDER TEA-21 WHICH EXPIRED BY ITS OWN TERMS IN FEDERAL FISCAL YEAR 2003.

The Petition for Writ of Certiorari should be denied because Gross Seed is claiming forward-looking relief for NDOR's nearly three-year old DBE program under TEA-21, which itself expired automatically in Federal Fiscal Year 2003.[1]

The DBE program, both as it appears in 49 C.F.R. Part 26 and as implemented in the State of Nebraska, is limited in duration. TEA-21's DBE provisions expired automatically in Federal Fiscal Year 2003 unless Congress determines that reauthorization of the program is appropriate. *See*, TEA-21, Section 1101(a). This point was made explicitly in DOT's "Participation by Disadvantaged Business Enterprises in Department of Transportation

[1] Federal Fiscal Year 2003 began on October 1, 2002, and expired on September 30, 2003.

Programs; Final Rule," Federal Register, Vol. 64, No. 21, p. 5096-5148, February 2, 1999. In the Final Rule, under subtitle "Duration of Relief," DOT stated, "The TEA-21 DBE program will end in 2004 unless reauthorized by the Congress. In each successive reauthorization bill for the surface transportation and airport programs, Congress will have the opportunity to examine the current state of transportation contracting and determine whether the DBE program statutes are still necessary to remedy the continuing effects of discrimination." 64 F.R. 5103. Congress recently extended TEA-21's provisions a second time until April 30, 2004, pursuant to the Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, HR 3850, February 29, 2004, 118 Stat. 478 (2004). Under DOT's Final Rule, NDOR's current DBE program would end if TEA-21 is not reauthorized.

The Eighth Circuit placed great emphasis on the fact that TEA-21 is subject to periodic Congressional reauthorization. Pet. App. at 11a. Citing *Grutter v. Bollinger*, 123 S.Ct. 2325, 2376 (2003), the Eighth Circuit held that periodic legislative debate, "[a]ssure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of a goal of equality itself." Pet. App. at 11a. Thus, Petitioner cannot show that forward-looking relief would be warranted to challenge the DBE provisions of TEA-21 at issue given the pending Congressional debate over TEA-21's reauthorization.

In addition, each recipient of Federal funds from the DOT DBE program, including NDOR, must re-evaluate its overall goal annually to ensure that it adequately reflects local market conditions. 49 C.F.R. Part 26.45. This annual review further ensures that NDOR's DBE program is

appropriately limited and will not last longer than the discriminatory effects it is designed to eliminate. 49 C.F.R. Part 26.51(c)-(g). NDOR re-evaluated its overall goal and substantially reduced the race- and gender-conscious portion of its overall goal in the Fiscal Year 2001 program at issue. The evidence at trial shows that the goals contained in the Fiscal Year 2000 and 2001 versions of NDOR's DBE program were substantially different.[2] *See*, NDOR C.A. App. A66-A85, "Statement on the U.S. Department of Transportation's Approval of Nebraska Fiscal Year 2000 Disadvantaged Business Enterprise Program"; NDOR C.A. App. A85-A92, "Explanation for Approval FY 2001, Nebraska Department of Roads DBE Program Goal-Setting Process".

The regulatory framework makes it clear that NDOR's DBE program must be evaluated *annually* pursuant to 49 C.F.R. Part 26. Forward-looking relief is not appropriate to analyze NDOR's Fiscal Year 2001 DBE program, which is now nearly three years old and has been reviewed annually. Gross Seed's argument that it would be appropriate to seek forward-looking relief at this stage of the case is not supportable given TEA-21's sunset provisions and NDOR's annual review of its DBE program.

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[2] NDOR's Fiscal Year 2000 began on July 1, 1999, and expired on June 30, 2000. NDOR's Fiscal Year 2001 began on July 1, 2000, and expired on June 30, 2001.

II. CONTRARY TO GROSS SEED'S ASSERTIONS, THERE IS NOT A SPLIT, BUT RATHER UNANIMITY IN THE CIRCUITS.

The Petition for Writ of Certiorari should be denied because there is no split in the United States Courts of Appeals.

Supreme Court Rule No. 10, in relevant part, states:

> A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.
>
> * * *
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in the way that conflicts with relevant decisions of this Court.

Gross Seed posits that review by this Court is appropriate to resolve conflicts among the United States Circuit Courts of Appeal. *See*, *Braxton v. United States*, 500 U.S. 344 (1991). However, there is no split, but rather unanimity, in the Circuit Courts of Appeal regarding the standards to be applied regarding the use of race and gender preferences in federal contracting programs.

First, Gross Seed cannot legitimately claim that there is a split in the circuits between the instant case and *Rothe Development Corp. v. United States Department of Defense*, 262 F.3d 1306 (Fed.Cir. 2001). *Rothe* dealt with a challenge to § 1207 of the National Defense Authorization Act of 1987 (the "§ 1207 program"), Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1986). The § 1207 program allowed the United States Department of Defense to use preferences in the selection of bids by small businesses owned by socially and economically disadvantaged businesses ("SBD's"). No state program was implicated. The Federal Circuit concluded that the District Court improperly applied a deferential legal standard rather than strict scrutiny and improperly relied on post-enactment evidence. The Second Circuit reversed and remanded the case to the District Court for a determination under a strict scrutiny standard. *Id.* at 1329.

Here, there is no question that the Eighth Circuit conducted its analysis under the strict scrutiny standard while mindful of this Court's admonition that strict scrutiny is not always "fatal in fact." Pet. App. at 6a, citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995). With respect to the compelling interest prong of the strict scrutiny analysis, the Eighth Circuit took a "hard look" at the evidence before Congress and concluded that Congress, "had a strong basis in the evidence to support

its conclusion that race-based measures were necessary". Pet. App. at 7a. Citing *Rothe* itself, the Eighth Circuit held that Gross Seed failed to meet its ultimate burden that no compelling governmental interest existed. *Id.*

With respect to the narrow tailoring prong of the strict scrutiny analysis, the Eighth Circuit took issue with the District Court's analysis that NDOR "need not independently establish that its program meets strict scrutiny". Pet. App. at 27a. Rejecting this argument advanced by NDOR on appeal, the Eighth Circuit held:

> [A] valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to these parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Pet. App. at 8a-9a.

The Eighth Circuit then reviewed both the federal DBE program and NDOR's implementation concluding that Gross Seed failed to prove that the revised DBE program was not narrowly tailored. There is no split between the Eighth Circuit's decision here and the Federal Circuit's decision in *Rothe,* a case explicitly relied upon by the Eighth Circuit in establishing the appropriate standard of review.

Second, rather than a split, there is unanimity between the Eighth Circuit's decision here and the Tenth Circuit's decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted*, 532 U.S. 941, *writ dismissed*, 534 U.S. 103 (2001) ("*Adarand II*"). It is unquestioned that the Eighth Circuit followed the Tenth

Circuit's lead under both prongs of the strict scrutiny analysis. Without reaching the merits, this Court found that the Tenth Circuit's "strict scrutiny analysis relies almost exclusively on regulations designed to channel benefits, through States and localities, to firms owned by individuals who hold themselves out to be socially and economically disadvantaged." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001).

The Eighth Circuit, like the Tenth Circuit, found that the programs implemented by TEA-21 and 49 C.F.R. Part 26 to channel benefits through the States to the DBE community were constitutional under this exacting review. The Eighth Circuit further extended this exacting review to NDOR's implementation of its DBE program.

Rule 10's admonition that this Court's discretion in granting certiorari will be exercised sparingly without a split within the United States Courts of Appeal has not been met.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Nos. 03-960 and 03-968

In the Supreme Court of the United States

GROSS SEED COMPANY, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

SHERBROOKE TURF, INC., PETITIONER

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the race-conscious provisions of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, and the Department of Transportation's revised implementing regulations, 49 C.F.R. Pt. 26 (2000), are constitutional.

2. Whether the court of appeals correctly held that Nebraska's and Minnesota's race-conscious Disadvantaged Business Enterprise Programs, implemented pursuant to TEA-21 and the Department of Transportation's regulations, are constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (03-960 Pet. App. 1a-14a; 03-968 Pet. App. 1a-17a) is reported at 345 F.3d 964. The opinions of the district courts in No. 03-960 (Pet. App. 15a-27a) and No. 03-968 (Pet. App. 18a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. The petitions for a writ of certiorari in

No. 03-960 and No. 03-968 were filed on December 30, 2003, and December 31, 2003, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases arise out of Congress's longstanding efforts to distribute federal highway construction and transit funds, and the opportunities created by those funds, in a manner that does not reflect or reinforce prior and existing patterns of discrimination on the basis of race and gender in those industries. They involve facial and as-applied constitutional challenges to the Transportation Equity Act for the 21st Century (TEA-21), the United States Department of Transportation (DOT) regulations implementing TEA21, and the States of Nebraska's and Minnesota's Disadvantaged Business Enterprise (DBE) Programs implementing TEA-21 and DOT's regulations.

1. a. Section 1101 of TEA-21, Pub. L. No. 105-178, 112 Stat. 111, and DOT's revised implementing regulations, 49 C.F.R. Pt. 26 (2000), are designed to remedy the effects of racial and sex discrimination in highway contracting and to ensure that federal dollars do not reinforce such discrimination.[1] The Act and DOT regulations authorize States and other recipients of federally-aided highway and transit projects to use race- conscious contracting remedies for socially and economically disadvantaged business enterprises. They require state and local governmental entities, as a con-

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[1] Section 1101(b)(1) states "Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 112 Stat. 113.

dition of receiving federal financial assistance for highway construction, to develop and implement DBE programs consistent with federal statutory and regulatory specifications.[2]

In 1995, in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (*Adarand I*), this Court considered an equal protection challenge to the federal DBE program enacted pursuant to TEA-21's predecessor statute. The Court held that the DBE program, as well as all other federally imposed race-conscious measures, must be evaluated under a strict scrutiny standard. As a result, in 1998, Congress debated whether it should reauthorize the DBE program. During those debates, both houses of Congress considered and soundly rejected, by bipartisan votes, two amendments that would have eliminated the DBE program. 144 Cong. Rec. 2797, 5565 (1998).

b. Prior to enacting TEA-21, Congress had evidence that DBEs continue to suffer the effects of discrimination that adversely affect their ability to participate on an equal opportunity basis in highway construction. The legislative record includes anecdotal evidence of

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[2] TEA-21 was initially set to expire on September 30, 2003. It has been extended twice while Congress has debated its reauthorization. The current extension will expire on April 30, 2004. See Surface Transportation Extension Act of 2003, Pub. L. No. 108-88, 117 Stat. 1110 (extending TEA-21 to February 29, 2004); Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, 118 Stat. 478 (extending TEA-21 to April 30, 2004). Both the House and Senate have passed reauthorization legislation with identical language, although the duration of the reauthorization has yet to be determined. See Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, S. 1072, 108th Cong., 2d Sess. § 1821 (Feb. 26, 2004); Transportation Equity Act: A Legacy for Users, H.R. 3550, 108th Cong., 2d Sess. § 1101(b) (Apr. 2, 2004).

intentional discrimination in awarding of subcontracts; pay disparities not explained by other factors; discrimination by non-governmental actors in the provision of business loans and bonding; and the adverse consequences of an "old boy" network that effectively excludes many minorities and women. See, *e.g.*, 144 Cong. Rec. at 2685, 2689-2690, 2699, 2706-2708; see also 64 Fed. Reg. 5100-5102 (1999) (summarizing). For example, a study of the construction industry supported by the United States Bureau of the Census and National Science Foundation found that "blacks, controlling for borrower risk, are less likely to have their business loan applications approved than other business owners," and generally receive smaller loans when approved. C. Grown & T. Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25-26, 39 (1992) (discussed by Rep. Norton, 144 Cong. Rec. at 10,656-10,657). Similarly, a 1997 survey of 58 state and local studies of disparity in government contracting found that "African Americans with the same level of financial capital as whites receive about a third of the loan dollars when seeking business loans." See M. Enchautegui et al., *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 36 (1997) (*Urban Inst. Rep.*) (discussed by Rep. Norton, 144 Cong. Rec. at 10,657-10,658). In addition, the legislative record includes numerous accounts detailing specific instances of discrimination against DBEs[3] as well as statistical data

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[3] See, *e.g.*, *Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance, and Urban Affairs*, 103d Cong., 2d Sess. 20 (1994); 144 Cong. Rec. at 2706-2708; *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand: Hearing*

and studies detailing varying amounts of underutilization of black, Hispanic, Asian, and Native-American owned businesses in government contracting.[4]

2. During the debates on TEA-21, members of Congress were aware that DOT, in response to this Court's *Adarand* decision, was substantially revising its regulations to help ensure that its DBE program satisfied strict scrutiny. 144 Cong. Rec. at 2685-2686, 2700-2702, 2708; *id.* at 2785-2787; *id.* at 10,370- 10,371. See, *e.g.*, H.R. Rep. No. 550, 105th Cong., 2d Sess. 4009-4010 (1998) ("The Department of Transportation is reviewing the DBE program in light of recent court rulings and has proposed new regulations to ensure that program withstands constitutional muster."). DOT issued those new regulations in February 1999. 49 C.F.R. Pt. 26 (2000).

DOT's revised DBE regulations require recipients of federal highway funds to adopt a DBE program and submit it to DOT for review and approval. DOT, consistent with TEA-21 (§ 1101(b)(2)(B), 112 Stat. 113), employs the definitions of "social[]" and "economic[]" disadvantage contained in the Small Business Act (SBA), 15 U.S.C. 631 *et seq.* Applicants are considered socially and economically disadvantaged if they have been "sub-

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Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. 55-56, 58-59, 64, 69, 74-76, 120 (1997) (*1997 ISTEA Hearing*).

[4] See, *e.g.*, *Urban Inst. Rep.* 11, 14-15, 19-22, 61; 144 Cong. Rec. at 10,371; *id.* at 2679-2680, 2699, 2794; Office of Advocacy, SBA, *The State of Small Business: A Report of the President* 1995 at 323 (1996); DOT, State of Colorado, *Disparity Study Final Report* (Apr. 1, 1998) (cited by Sen. Chaffee, 144 Cong. Rec. at 10,371); 2 State of Louisiana, *Disparity Study* 204-205 (June 1991) (cited by Sen. Kennedy, 144 Cong. Rec. at 2782). See also *1997 ISTEA Hearing* 55-56, 58-59, 64, 69, 74-76, 120.

jected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. 637(a)(5), *and* their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). Under Section 637(d)(3)(C)(ii) of the Small Business Act, African-Americans, Native-Americans, Asians and Hispanics are deemed presumptively economically and socially disadvantaged. Section 1101(b)(2)(B) of TEA-21 also deems women presumptively economically and socially disadvantaged. 112 Stat. 113.

DOT's revised DBE regulations employ enhanced regulatory safeguards to help ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged participate in a DBE program. Owners of firms applying for DBE certification, including those who are by statute deemed presumptively disadvantaged, must submit a signed and notarized statement saying that they are socially and economically disadvantaged and must disclose their personal net worth with appropriate documentation. 49 C.F.R. 26.67(a)(1) and (2)(i). If the individual's personal net worth exceeds $750,000 (excluding the value of the individual's home and equity in the business seeking certification), the presumption of economic disadvantage is conclusively rebutted and the individual is not eligible for certification in a DBE program. 49 C.F.R. 26.67(b)(1). The regulations further provide that (a) any person may challenge whether a specific DBE owner is in fact socially and economically disadvantaged, 49 C.F.R. 26.87; (b) a recipient of DOT financial assistance may at any time commence a proceeding to

rebut the presumption of disadvantage with respect to any individual, 49 C.F.R. 26.67(b)(2); and (c) DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e).

To help ensure that the use of race- and gender-conscious remedies for the effects of discrimination are tailored to local conditions, the regulations state that the recipient's overall annual goal for DBE participation must be "based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts" and that the "goal must reflect [the state or other federal funding recipient's] determination of the level of DBE participation [the recipient] would expect *absent the effects of discrimination.*" 49 C.F.R. 26.45(b) (emphasis added). This two-step overall goal setting process begins with a determination of a base figure for relative DBE availability. 49 C.F.R. 26.45(c). States can choose from among several approaches, or a combination of approaches, for determining the base figure, including DBE directories and Census Bureau data, bidders lists, data from disparity studies, goals of another recipient in a substantially similar market, or any other methodology based on demonstrable evidence of local market conditions. 49 C.F.R. 26.45(c)(1)-(5). Next, recipients must determine what adjustments, if any, should be made to the base figure, based on an examination of all the evidence available in a jurisdiction, to arrive at the overall DBE participation goal. 49 C.F.R. 26.45 (d). The regulations also state that a recipient is not to be penalized simply

for failing to meet its annual overall DBE participation goal. 49 C.F.R. 26.41, 26.47.

The regulations prohibit the use of quotas and permit set-asides only in the most egregious instances of otherwise irremediable discrimination. 49 C.F.R. 26.43; 64 Fed. Reg. at 5107-5108. In addition, they require recipients to meet the maximum feasible portion of their DBE participation goal through race- and gender-neutral means. 49 C.F.R. 26.51(b). Race- and gender-conscious measures may be used *only* if race- and gender-neutral means will not permit achievement of the established goals, 49 C.F.R. 26.51(d), and recipients must discontinue use of all race- and gender-conscious measures if, at any point, it appears that they can achieve the DBE goal entirely through race-neutral means. 49 C.F.R. 26.51(f)(1). The DOT regulations also require that a prime contractor that demonstrates good-faith efforts in achieving DBE participation must be awarded a contract even if it fails to meet a specific DBE participation goal. 49 C.F.R. 26.53(a).

3. a. The Nebraska Department of Roads (NDOR) receives federal aid pursuant to TEA-21 for the construction of highways. To comply with TEA-21 and DOT's DBE regulations, NDOR analyzed conditions within the local highway construction market relating to DBE participation. As one method of complying with Section 26.45(c), NDOR utilized bid data to calculate the relative availability of DBEs in the local market by comparing the total number of ready, willing and able DBEs to all contractors. Then, in accordance with 49 C.F.R. 26.51(c), NDOR estimated the level of DBE participation that could be achieved with race- and gender-neutral measures by examining DBE participation levels in highway construction contracts with and without race-conscious goals. Based on this evidence,

NDOR set an overall annual goal for DBE participation of 11% for fiscal year 2000, and reduced it to 9.95% for 2001, of which it determined that 2.33% and 5.13%, respectively, could be achieved through race- and gender-neutral means. 03-960 Pet. App. 14a, 18a; 03-960 Pet. 9-10.

In March of 2000, DOT reviewed NDOR's then-current DBE program and determined that it complied with DOT's regulations. Although DOT does not specifically review every substantive decision made by a state implementing a DBE program, it did conclude that NDOR's goal-setting methodology satisfied the procedures set forth in 49 C.F.R. 26.45(f)(3) and that there was a valid basis under federal regulations for NDOR's adoption of its annual goals for fiscal years 2000 and 2001.

b. Petitioner Gross Seed specializes in landscaping and regularly bids on federally-assisted highway construction contracts in Nebraska as a prime contractor or subcontractor. 03-960 Pet. App. 16a. In March 2000, it filed a complaint against the State of Nebraska, alleging that it was denied a subcontract on a project funded by TEA-21 because of Nebraska's DBE program. Petitioner charged, in both facial and as-applied challenges, that the DBE provisions in TEA-21, DOT's regulations, and Nebraska's DBE program violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Petitioner sought monetary, injunctive, and declaratory relief. The United States, DOT, and the Federal Highway Administration, a DOT agency, intervened. Petitioner filed an amended complaint against the federal and state defendants. *Id.* at 15a-19a.

The district court conducted a seven-day bench trial. The evidence included 174 exhibits, most of which were

documents from the legislative record, as well as testimony of federal and state government officials responsible for administering and implementing the federal and local DBE programs, individuals affected by those programs, and experts who analyzed the legislative record. 03-960 Pet. App. 15a-20a.

c. On May 6, 2002, the district court, applying strict scrutiny, held that TEA-21 and DOT's DBE regulations are constitutional on their face and that NDOR's DBE program is constitutional as implemented. 03-960 Pet. App. 22a, 27a. The court found that Congress had "a strong basis in evidence" to support its conclusion that remedial action was necessary. *Id.* at 23a. Based on its review of the legislative record, the district court concluded that the factual predicate was sufficient to justify the race-conscious measures authorized in TEA-21 because the evidence "demonstrate[s] * * * racial and gender discrimination within the construction industry" and "Congress, through extensive research and hearings, determined that race-neutral measures alone would not entirely remedy the problem of past discrimination." *Id.* at 24a.

The district court also found that the DOT's DBE regulations are narrowly tailored on their face. 03-960 Pet. App. 24a-26a. The court noted that the regulations (a) require recipients to "meet the maximum feasible portion of their overall goal by using race-neutral means" (*id.* at 24a), (b) exclude firms owned by individuals who have a net worth in excess of $750,000 (*id.* at 25a), (c) guarantee that a recipient's annual goal reflects local market conditions (*ibid.*), and (d) limit the impact on non-DBE firms by virtue of their "'good faith' provisions" and local assessment (*id.* at 26a). The court also noted that the program is of limited duration, as TEA-21 would expire in 2003. The district court

therefore concluded that NDOR's implementation of the Federal DBE program was constitutional. *Id.* at 26a-27a.

4. a. The Minnesota Department of Transportation (MNDOT) receives federal aid pursuant to TEA-21 for the construction of highways. To comply with TEA-21 and DOT's DBE regulations, MNDOT analyzed conditions within the local highway construction market relating to DBE participation. As one method of complying with Section 26.45(c), MNDOT utilized bid data to calculate the relative availability of DBEs in the local market by comparing the total number of ready, willing and able DBEs to all contractors. Then, in accordance with 49 C.F.R. 26.51(a), MNDOT estimated the level of DBE participation that could be achieved with race- and gender-neutral measures by contrasting DBE participation levels in highway construction programs with and without race-conscious goals. Based on this evidence, MNDOT set an overall annual goal for DBE participation of 11.6% for fiscal year 2001. Minnesota noted that, in 1999, when its DBE program had been enjoined, DBE participation was 2.25%. MNDOT, therefore, concluded that it could meet 2.6% of its annual goal through race-neutral means, and 9% of its goal through race-conscious means. DOT reviewed MNDOT's then-current DBE program and concluded that it complied with DOT's regulations. 03-968 Pet. App. 22a.

b. Petitioner Sherbrooke Turf specializes in landscaping and regularly bids on federally-assisted highway construction contracts in Minnesota as a subcontractor. 03-968 Pet. App. 18a. In April 2000, it filed a complaint in federal court against the State of Minnesota, alleging that it was denied a subcontract on a highway project funded by TEA-21 because of Minnesota's DBE program. Petitioner charged, in both facial

and as-applied challenges, that the DBE provisions in TEA-21, DOT's DBE regulations, and Minnesota's DBE program violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Petitioner sought injunctive and declaratory relief. The United States, DOT, and the Federal Highway Administration intervened. *Id.* at 18a-19a.

c. On November 15, 2001, the district court granted defendants' motions for summary judgment. Applying strict scrutiny, the court held that TEA-21 and DOT's DBE regulations were facially constitutional and that Minnesota's DBE program was constitutional as implemented. 03-968 Pet. App. 27a-37a.

5. The court of appeals consolidated the cases on appeal and affirmed in both cases. 03-960 Pet. App. 2a-14a. The court stated that it "conduct[ed] a de novo review of th[e] legislative record," and "t[ook] a hard look at the evidence," applied this Court's decisions, and concluded that "Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary." *Id.* at 7a (citing *Adarand* v. *Slater*, 228 F.3d 1147, 1167-1176 (10th Cir. 2000) (finding legislative record sufficient to uphold the facial constitutionality of TEA-21 and DOT's regulations), cert. granted in part, 532 U.S. 967, cert. dismissed as improvidently granted, 534 U.S. 103 (2001) (*Adarand II*)).

The court of appeals rejected petitioners' argument that Congress (and the Tenth Circuit in *Adarand II*) had erroneously relied only on a federal document that summarized evidence relating to the compelling interest supporting racial preferences in contracting, *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (1996) (*Appendix*). The court stated, "Congress

has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry," 03-960 Pet. App. 7a, and that petitioner failed to "present affirmative evidence" to rebut the extensive legislative record. *Ibid.*

The court of appeals also rejected petitioners' contention that Congress, in order to enact TEA-21, must have had "strong evidence of race discrimination in construction contracting *in Minnesota and Nebraska*" to enact national remedial legislation. 03-960 Pet. App. 8a. The court stated, "[w]hen the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation." *Ibid.* The court of appeals further explained that it would consider petitioners' concern as to the alleged absence of discrimination in Nebraska and Minnesota in the context of its narrow tailoring analysis, holding that "a national program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis." *Id.* at 8a-9a.

The court of appeals then held that the federal DBE regulations are narrowly tailored on their face. The court emphasized that DOT's revised regulations place strong emphasis on the "use of race-neutral means to increase minority business participation in government contracting." 03-960 Pet. App. 11a (quoting *Adarand I*,

515 U.S. at 237-238). It noted that the DOT regulations require that the "'maximum feasible portion'" of a recipient's overall annual DBE participation goal be met with "race-neutral means," allow set-aside contracts only "when no other method could be reasonably expected to redress egregious instances of discrimination," and prohibit the use of quotas. *Id.* at 10a.

It also stressed that the current DBE regulations provide "substantial flexibility," 03-960 Pet. App. 11a, because a recipient of federal funds may seek waivers or exemptions from many of the regulatory requirements, may not be penalized for failing to meet an overall annual DBE participation goal as long as it exercises good faith, and must terminate use of race- or gender-based efforts when its goal can be met entirely through race- or gender-neutral means, *id.* at 10a-11a. The court of appeals also noted that an individual owner who has a net worth that exceeds $750,000 (excluding the individual's ownership in the applicant DBE firm and the individual's equity in his or her primary residence) cannot qualify as economically disadvantaged, *id.* at 11a, and stated that because TEA-21 is set to expire and requires congressional reauthorization for its continued operation, "the DBE program contains built-in durational limits," *ibid.*; see 49 C.F.R. 26.67(a)(2)(i) and (iii).

The court also underscored the importance of DOT's requirement that a recipient's DBE participation goals be tied to the relevant local market. 03-960 Pet. App. 11a-12a. It explained that, "in stark contrast" to the program struck down in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), DOT's regulations require "realistic goals for DBE participation" based on demonstrable evidence of local market conditions. 03-960 Pet. App. 12a. The court of appeals further noted that the

DOT regulations expressly declare that TEA-21's "statutory ten percent provision 'is an aspirational goal at a national level,' not a mandatory requirement for grantee States." *Id.* at 10a (quoting 49 C.F.R. 26.41(b)).

Relying on this Court's decisions applying strict scrutiny, the court of appeals explained that both "Congress and DOT have taken significant steps to minimize the race-based nature of the DBE program." 03-960 Pet. App. 12a. It explained that because the federal regulations create a rebuttable presumption of social and economic disadvantage, exclude firms owned by wealthy minorities, and allow individuals not deemed presumptively disadvantaged to demonstrate actual social and economic hardship, "race is made relevant in the program, but it is not a determinative factor," *ibid.* (citing *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2345-2346 (2003), and *Gratz* v. *Bollinger*, 123 S. Ct. 2411, 2429 (2003)).

Finally, the court of appeals held that both Nebraska and Minnesota had constitutionally implemented the federal DBE program. 03-960 Pet. App. 13a-14a. The court concluded that both States had satisfied DOT's regulatory requirement that its program be "demonstrably needed" by complying with federal regulations that require DBE participation goals to be based on "demonstrable evidence" reflecting the local level of DBE participation expected in the absence of discrimination, adjusted to account for the maximum portion of the goal that can be achieved through race-neutral means. *Id.* at 9a, 11a, 14a, 15a-16a. The court also concluded that petitioners "failed to prove that the revised DBE program is not narrowly tailored" as applied to their respective States. *Id.* at 13a, 14a.

ARGUMENT

This Court's review of the questions presented is not warranted at this time. In *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (*Adarand I*), this Court held that all race-conscious measures are subject to strict scrutiny. Since that decision, two federal courts of appeals and five district courts have reviewed TEA-21 and DOT's DBE regulations under strict scrutiny. Each of those courts has come to the same conclusion—that the record before Congress was, and remains, sufficient to permit Congress to enact a race- and gender-conscious DBE contracting program, and that DOT's extensive regulations, on their face, are narrowly tailored to achieve Congress's compelling remedial purposes. Indeed, DOT promulgated the current regulations and extensively altered the federal DBE program following this Court's decision in *Adarand I*, precisely to help ensure compliance with the strict scrutiny standard. The court of appeals correctly applied that exacting standard and concluded that the federal DBE program, and Nebraska's and Minnesota's implementation of that program, are constitutional. Because that decision is correct and does not conflict with any decision of this Court or of any other court of appeals, the petitions for a writ of certiorari should be denied.

1. Petitioners make a number of contentions about the adequacy of the record before Congress. 03-960 Pet. 17-20; 03-968 Pet. 5-10. None has merit or otherwise justifies this Court's review.

a. First, petitioners contend (03-960 Pet. 17-20; 03-968 Pet. 5-10) that the court of appeals erroneously held that Congress had a "strong basis in evidence" to support its conclusion that race-based remedial action was necessary. Petitioners argue that the court of appeals

did not undertake the detailed, skeptical analysis of the legislative record that strict scrutiny requires. As the court of appeals itself made clear, petitioners are mistaken.

After stating that petitioners argued for "a de novo review of this legislative record," the court of appeals stated that "[w]e agree we must take a hard look at the evidence, *and we have done so*." 03-960 Pet. App. 7a (emphasis added). Many of the hearings, debates, and reports that are part of the legislative record compiled by Congress during the three decades in which it has been considering these types of contracting programs were included in the record before the court of appeals. The court discussed this extensive record and concluded that it satisfied the government's burden of showing "a strong basis in * * * evidence to support its conclusion that race-based measures were necessary." *Ibid.*

Petitioners' assertions that the court of appeals' conclusion was "based entirely on the Tenth Circuit's opinion in *Adarand II*" and that the court placed too much emphasis on the *Appendix*, 61 Fed. Reg. at 26,050 (03-960 Pet. 17, 18; see 03-968 Pet. 7-10) are equally mistaken. The court below merely stated that, after undertaking its own "hard look" at the extensive legislative record, it agreed with the Tenth Circuit's conclusion in *Adarand II* that that record was sufficient. 03-960 Pet App. 7a. That statement hardly indicates that the court of appeals here relied exclusively on the Tenth Circuit's decision or failed to conduct its own review of the legislative record. Nor is there any basis to conclude that the court of appeals placed too much emphasis on the *Appendix* document referenced by petitioners. Rather, the court examined the entirety of the legislative record, which "Congress * * * spent

decades compiling," *ibid.*, and concluded that it established a strong basis in evidence of the need for a race-conscious DBE program.

Accordingly, the issue of the level of review courts should give the legislative record is not presented in these cases, because the court of appeals expressly stated that it gave the record an appropriately careful review and nonetheless found the record sufficient. This Court initially granted review in *Adarand II* to consider whether the Tenth Circuit "misapplied strict scrutiny" by "applying a far more lenient standard to acts of Congress * * * than actions of state and local governments," see Pet. 5, *Adarand II*, *supra* (No. 00-730). Here, in contrast, the court of appeals specifically stated that it "t[ook] a hard look at the evidence," 03-960 Pet. App. 7a, and gave no indication whatsoever that it was applying a lenient standard or otherwise improperly deferring to Congress's findings. Thus, no question about the standard applied by the court of appeals is presented here, and petitioners' repeated attacks on the Tenth Circuit's decision in *Adarand II* are entirely misplaced.

b. Because these cases do not present the issue of whether the court of appeals applied the wrong legal standard in assessing the legislative record, all that remains is the question whether the court of appeals reached the proper conclusion about whether Congress had a strong basis in evidence to support its enactment of TEA-21. That inherently fact- intensive question is not the sort of issue that generally warrants this Court's review. See *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

In any event, the court of appeals' decision as to the sufficiency of the record before Congress is correct and in accord with the decisions of every other federal court

to consider the question. The record before Congress amply demonstrated a "strong basis in evidence" to support the enactment of the DBE provision in TEA-21 and DOT's DBE regulations, which authorize the use of race-conscious contracting preferences in jurisdictions where their use is manifestly necessary to remedy the effects of identified local discrimination. As summarized above, see pp. 3-5, *supra*, it includes evidence that decades of private and, at times, governmental discrimination have combined to continue to depress the opportunities for firms owned by socially and economically disadvantaged persons to compete on a discrimination-free basis for federally-supported highway construction contracts throughout the United States. The record also contains evidence of intentional discrimination on the basis of race, as well as evidence that discrimination in securing capital and other resources had affected minority and female business owners. See, *e.g.*, C. Grown & T. Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25-26, 39 (1992) (discussed by Rep. Norton, 144 Cong. Rec. at 10,656-10,657). Such discrimination raised costs for these firms, and in some instances simply made competing for contracts impossible. The use of "old boy networks," in some instances based on race or gender, often deprived newly formed minority businesses of the opportunity to bid on contracts and subcontracts. The evidence also shows that prime contractors would engage in bid shopping, and would allow their preferred subcontractors to match or better bids previously made by potential minority subcontractors. And there was evidence that black, Hispanic, Asian, and Native-American-owned businesses were underutilized in government contracts. See, *e.g.*, M. Enchautegui et al., *Do Minor-*

ity-Owned Businesses Get a Fair Share of Government Contracts? 11, 14-15, 19-22, 36, 61 (1997) (*Urban Inst. Rep.*) (discussed by Rep. Norton, 144 Cong. Rec. at 10,657-10,658).

Congress, moreover, relied on a wide-range of evidence, including statistical studies demonstrating varying levels of disparities in the utilization between minority- and non-minority-owned firms. See note 4, *supra*. As this Court stated in *Croson*, Congress has the authority to ensure that the federal government does not become a "passive participant" in private racial discrimination, and "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that all public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evils of private prejudice." 488 U.S. at 492. There was ample evidence within the legislative record for the court of appeals to conclude that, absent TEA-21 and its accompanying regulations, Congress would become exactly that passive participant, extending the effects of private racial and gender discrimination. See *Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 729-736 (2003) (holding that Congress's findings of gender discrimination were sufficient to support the Family and Medical Leave Act of 1993). And petitioner failed below, and fails here, to identify specific evidence in the record that is unreliable, or to explain how the legislative record is inadequate.[5]

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[5] Petitioners' reliance (03-960 Pet. 19; 03-968 Pet. 7) on a United States General Accounting Office Report to attack the use of disparity studies is unavailing. *GAO-01-586, Disadvantaged Business Enterprises* (June 2001) (*GAO Report*). This Court has repeatedly recognized that disparity studies can be relevant and probative of whether there is sufficiently strong evidence to demonstrate a compelling interest in remedial action. See *Croson*, 488 U.S. at

c. Equally important, the court of appeals' decision is consistent with every other federal appellate or district court decision analyzing the TEA-21 program. Every federal court that has considered whether TEA-21's legislative record is sufficient to uphold the statute's facial constitutionality has applied strict scrutiny and concluded that Congress had "a strong basis" in evidence to support its conclusion that remedial relief was necessary. See 03-960 Pet App. 7a (8th Cir.); *id.* at 24a (D. Neb.); 03-968 Pet. App. 26a-29a (D. Minn.); *Adarand II*, 228 F.3d at 1167-1176 (10th Cir.), aff'g 965 F. Supp. 1556, 1570-1577 (D. Colo. 1997)); *Western States Paving Co.* v. *Washington Dep't of Transp.*, No. C00-5204 RBL (W.D. Wash. Sept. 3, 2003), appeal pending, No. 03-35783 (9th Cir.); *Northern Contracting, Inc.* v. *State*, No. 00-C-4515, 2004 WL 422704 (N.D. Ill. Mar. 3, 2004). The consistent results reached by the federal courts of appeals and district courts that have reviewed the legislative record strongly suggest that this Court need not grant review in this case.[6]

503; *id.* at 509. Moreover, petitioners' reliance on the GAO Report to suggest that the court of appeals erroneously concluded that Congress had a compelling interest is misplaced, since the GAO Report expressly provides that its purpose "was not to address the question of whether the DBE program satisfies the requirements of strict scrutiny," *GAO Report* 82, and in fact reviewed only 14 such disparity studies.

[6] Cf. *Cortez* v. *NASA*, 950 F. Supp. 357 (D.D.C. 1996) (discussing whether Congress had a compelling interest supporting the Small Business Act and the SBA's race-conscious 8(a) contracting program); *id.* at 361 ("Congress first implemented the Small Business Act to combat serious unlawful discrimination in government contracting. In oversight and reauthorization hearings held since implementation of the act, Congress has continued to find such discrimination.").

Petitioner Gross Seed incorrectly asserts (03-960 Pet. 23-25) that the court of appeals decision conflicts with the Federal Circuit's decision in *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (2001). In *Rothe*, the Federal Circuit reversed a decision upholding the constitutionality of a federal defense contracting program that operated by increasing the bid of a non-minority-owned firm by up to ten percent. It held that the "district court improperly applied a deferential legal standard rather than 'strict scrutiny,' and impermissibly relied on post-reauthorization evidence to support the program's constitutionality as reauthorized." *Id.* at 1312. Because the court of appeals here applied strict scrutiny, did not defer to Congress, and considered only evidence that was in the legislative record when Congress enacted TEA-21, its decision does not conflict with *Rothe*.

2. This Court should not grant review of petitioners' claim (see, *e.g.*, 03-960 Pet. 20-22) that Congress lacked authority to enact TEA-21 because it did not have evidence of past discrimination in the construction industry in each of the 50 States. That claim is inconsistent with this Court's precedent and, if upheld, would seriously compromise Congress's authority to carry out its fundamental purpose to enact legislation to remedy problems that affect the Nation as a whole. Cf. *Hibbs*, 538 U.S. at 734-735.

To the extent petitioners assert that Congress may not enact even narrowly-tailored legislation—legislation that authorizes and requires a race-conscious remedy only in those local jurisdictions where there is discrimination (or its effects) that cannot otherwise be remedied—unless it first finds discrimination in every State, its contention is plainly without merit. Indeed, as this Court has explained, while a state or local

government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power to ensure that federal spending does not reinforce discrimination in locations where federal dollars are spent. *Croson*, 488 U.S. at 490-492 (plurality opinion); see *Oregon* v. *Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring); see also *Hibbs*, 538 U.S. at 734 (observing that Congress can look to evidence of inadequate leave policies nationwide in reaching conclusion about need for legislation, "no matter how generous" any one State's policies may have been).[7]

In any event, even though TEA-21 is national in scope, DOT's DBE regulations, if properly implemented, minimize the danger that state race-conscious DBE programs will be used where there is an absence of discriminatory effects that cannot be remedied through race- or gender-neutral means. As the court of appeals explained, "a valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." 03-960 Pet. App. 8a-9a. Since the DOT

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[7] Contrary to petitioner Gross Seed's claim (03-960 Pet. 24), the Federal Circuit's *Rothe* decision does not suggest that the court of appeals applied a "watered-down version of strict scrutiny" because it approved of TEA-21's DBE program without evidence as to its necessity in every State. In fact, *Rothe* says precisely the opposite. *Rothe*, 262 F.3d at 1329 (explaining that "[w]hereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, we do not think that Congress needs to have had evidence before it of discrimination in all fifty states in order to justify a race-conscious remedy"); see also *id.* at 1321 n.14 (noting that even under strict scrutiny Congress is entitled to deference in its factfinding).

regulations require that DBE participation goals be tied to local market conditions, they help to ensure that a State's implementation of the program depends on the circumstances in that jurisdiction, not in other parts of the country. In addition, the regulations allow waivers and exemptions in certain circumstances, contain exceptions from meeting overall DBE participation goals if there is a good-faith effort at compliance, and bar the use of race-conscious measures when full DBE participation in that State, again based on local assessments, can be achieved through race-neutral means. See pp. 7-8, *supra*. As a result, the statutory and regulatory provisions, taken together, are designed to assist States and other recipients of federal funds in determining when, *if at all*, targeted race-conscious remedial contracting measures are manifestly necessary to overcome the effects of discrimination in a particular jurisdiction. It is *only* in those circumstances, and in particular where it is clear that race-neutral measures are insufficient to overcome the effects of discrimination, that the federal DBE regulations permit fund recipients to adopt limited race-conscious remedies.

3. With respect to their claims regarding narrow tailoring, petitioners have presented no argument and cited no case law demonstrating that any portion of DOT's regulations is facially defective or incapable of constitutional implementation. Further, because petitioners did not establish below that there is no set of circumstances in which the regulations can be constitutionally applied, the question whether the regulations are narrowly tailored on their face is not presented. See *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984); *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

As the court of appeals noted (03-960 Pet. App. 9a-12a), DOT's DBE regulations satisfy this Court's requirement that the remedial use of race be narrowly tailored. The regulations limit the benefits of race-conscious remedies to those individuals who are considered socially and economically disadvantaged as defined in the regulations, and require recipients to set numerical DBE participation goals based on localized assessments of DBE availability and the DBE utilization expected in the absence of discrimination, thereby limiting the burden on non-minorities. The regulations also require that race-conscious contracting remedies be used only where there is demonstrable local evidence showing less than full DBE participation compared to what would be expected in the absence of discrimination, and even then only a determination that race-neutral efforts will be ineffective at achieving the overall DBE participation goal. Furthermore, the use of race-conscious contracting remedies in DBE programs authorized by TEA-21 and DOT regulations is of limited duration, because TEA-21 must be reauthorized (or further extended) to extend beyond April 30, 2004. See note 2, *supra*. Moreover, DOT's regulations require termination of the use of race- conscious measures in any jurisdiction where race-neutral measures are adequate to meet DBE participation levels expected in the absence of discrimination. Thus, on their face, DOT's regulations satisfy this Court's precedent describing the requirements of narrow tailoring. See, *e.g.*, *United States* v. *Paradise*, 480 U.S. 149 (1987); *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2342-2346 (2003); see also 64 Fed. Reg. 5096, 5102-5103 (1999).[8]

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[8] Petitioner Sherbrooke Turf also argues that the federal DBE program violates Section 5 of the Fourteenth Amendment and

4. Petitioners also argue (03-960 Pet. 22; 03-968 Pet. 20- 23) that the court of appeals erred in finding that Nebraska's and Minnesota's implementation of the federal DBE program are narrowly tailored. Petitioner Gross Seed, for example, asserts that the court "placed great weight on the fact" that Nebraska set its overall DBE participation goals in accordance with a study that "did not purport to[] prove discrimination against DBEs." 03-960 Pet. 22.

The question whether Nebraska or Minnesota has implemented the federal DBE program in a manner consistent with constitutional requirements is a fact-intensive inquiry that does not warrant this Court's review. Because each State, pursuant to DOT's regulations, adopts and implements its own individualized DBE program, tailored to conditions within its jurisdiction, a decision by this Court as to the constitutionality of Nebraska's or Minnesota's program will have little applicability to other jurisdictions.

In any event, the court of appeals correctly concluded that Nebraska's and Minnesota's DBE programs are sufficiently narrowly tailored. Though not dispositive on the constitutional questions, DOT found that those programs complied with federal DBE regulations that are designed to help narrowly tailor implementation of the federal DBE program by assisting States in determining when, if at all, race-conscious contracting preferences are manifestly necessary to remedy the effects of discrimination in a particular jurisdiction. For ex-

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impermissibly intrudes on matters reserved to the States. See 03-968 Pet. 6, 24-26. The federal DBE program, however, was enacted pursuant to Congress's authority under the Spending Clause, not the Fourteenth Amendment, and there is no justification for importing the fundamentally different standard for determining the constitutionality of Section 5 enactments to this case.

ample, both Nebraska and Minnesota analyzed local market conditions and set their annual DBE participation goals in 2000 and 2001 based on data that compared the availability and utilization of DBEs and took account of DBE participation that could be achieved through race-neutral means. 03-960 Pet. App. 14a; 03-968 Pet. App. 15a-16a. DOT reviewed the States' goal-setting methodology and determined that it complied with DOT's regulations.[9]

5. Petitioner Gross Seed argues (03-960 Pet. 14-17) that this Court should review the court of appeals' decision because it previously agreed to review the Tenth Circuit's decision in *Adarand II*, which, petitioner asserts, presented "the same important questions" raised in these cases. *Id.* at 5. Petitioner's reliance on this Court's prior grant of plenary review is misplaced. While both *Adarand II* and these cases involve elements of DOT's DBE regulations, there are important differences between the issues presented to this Court then and now.

The first Question Presented in *Adarand II*, for example, related to whether the court of appeals had

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[9] As it did in the court of appeals, petitioner Sherbrooke Turf relies on statements by various state employees that they personally were not aware of specific incidences of discrimination in highway construction in Minnesota to assert that there is no evidence of discrimination in Minnesota to support using race-conscious DBE goals. 03-968 Pet. 19. Petitioner, however, conceded at oral argument in the district court that the state employees merely stated that they did not know of any instances of discrimination and that "[t]hey did not say there isn't" any discrimination in Minnesota. Supp. Pet. App., Tab 1, Tr. 71. Thus, even according to petitioner, the state employees' statements, taken in the light most favorable to petitioner, do not cast doubt on the evidence relied upon by MNDOT to justify its race-conscious, remedial contracting goals.

"misapplied the strict scrutiny standard in determining if Congress had a compelling interest" to enact TEA-21. 00-730 Pet. at I. As explained above (at p. 18, *supra*), that question is not presented here. The *Adarand II* petition (00-730 Pet. at 6) alleged that the Tenth Circuit had improperly deferred to Congress and had "failed to demand a strong basis in evidence to support a compelling governmental interest." In contrast, the court of appeals here specifically stated that it took a "hard look" at the entire legislative record in determining whether Congress had a strong basis in evidence to demonstrate a compelling governmental interest. 03-960 Pet. App. 7a. In other words, the court of appeals here made clear that it gave the legislative record precisely the level of review that the petitioner in *Adarand II* alleged that the Tenth Circuit failed to provide.

The second Question Presented in *Adarand II* was "[w]hether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored." 532 U.S. 968 (2001). Although that question is also presented in these cases, the circumstances surrounding that issue have changed substantially since this Court's decision to grant review in *Adarand II*. The Tenth Circuit, when deciding *Adarand II*, was faced with the problem that the federal DBE regulations had been changed during the litigation itself. While the initial contract dispute occurred under old regulations, DOT promulgated its new regulations before the case returned for the second time to the Tenth Circuit. Indeed, the Tenth Circuit held that the federal DBE program under DOT's old regulations was unconstitutional, while the new regulations adequately addressed those constitutional infirmities. See 228 F.3d at 1176-1187.

The potential for uncertainty regarding DOT's regulations in the Tenth Circuit's decision has been substantially lessened by subsequent litigation. As stated above, each federal district court and court of appeals to examine the constitutionality of DOT's regulations has held that, on their face, the new regulations narrowly tailor the use of race and gender-based contracting remedies authorized by TEA-21. The more recent litigation, and the consistency of federal court decisions as to the DOT regulations, make plenary review of the second and final issue presented in *Adarand* three years ago unnecessary.

In sum, the fact that this Court granted plenary review in *Adarand II* does not compel a similar grant today. Cf. *Concrete Works of Colorado, Inc.* v. *City of Denver*, 124 S. Ct. 556 (2003) (Scalia, J., dissenting from the denial of cert.). Federal courts are carefully scrutinizing the legislative record, and are unanimously and consistently finding that Congress had a strong basis in evidence on which to conclude that a narrowly-tailored use of race-conscious contracting remedies is permissible. Moreover, as revealed by the consistent decisions of federal courts, DOT's regulations are, on their face, narrowly tailored and can be implemented by federal funding recipients in a constitutional manner. While the legal issues that govern the use of race-based contracting preferences were perhaps unclear when this Court granted review in *Adarand II*, both because the application of strict scrutiny to the federal government's use of race-conscious actions was relatively new, see *Adarand I*, *supra*, and because the ongoing modifications of the DOT regulatory scheme were confusing, federal courts, as of now, demonstrate neither confusion nor uncertainty when reviewing the facial constitutionality of TEA-21 and the DOT DBE regulations.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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No. 03-960

IN THE

Supreme Court of the United States

GROSS SEED COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND NEBRASKA DEPARTMENT OF ROADS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Far from demonstrating that the decision below does not merit this Court's review, the briefs in opposition filed by the federal and Nebraska respondents confirm that such review is indeed warranted.

1. At the outset, it should be noted that respondents do not dispute four important points. First, respondents do not dispute that the challenged provisions of TEA-21, DOT's DBE regulations, and Nebraska's DBE program operate on the basis of race and therefore are subject to strict scrutiny. *Cf. Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 212-213 (1995) (federal respondents argued that former DOT

program was based on disadvantage, not on race, and thus was subject only to "the most relaxed judicial scrutiny").[1]

Second, it is conceded that, although DOT's DBE regulations required Nebraska to have a DBE program, *see* Neb. Opp. 2 ("NDOR was mandated by DOT and FHWA to implement a DBE program"), and also authorized Nebraska to include race-conscious measures in its program, those same regulations did *not* require Nebraska at any point to look for or find any evidence of discrimination in its construction industry, *see id.* at 5 ("pursuant to 49 C.F.R. Part 26, NDOR was not to look for specific instances of discrimination"). To be clear: DOT's regulations do not require a state, before resorting to racial preferences, to undertake the kind of searching examination that would reveal discrimination within its construction industry. On the contrary, those regulations require every state receiving federal highway funds to have a DOT-approved DBE program—in which the state may use race-conscious measures—whether or not the state has looked for or found evidence of discrimination within its borders.

Third, and relatedly, the Nebraska respondents candidly admit that "NDOR complied specifically with DOT's directive that it was not required to look for specific instances of discrimination in the highway contracting community." Neb. Opp. 6. Thus, "NDOR did not * * * look for specific instances of discrimination since Congress had decided there was discrimination." *Id.* at 5. But if Congress had before it evidence of discrimination in Nebraska, that evidence is not cited by the Nebraska or federal respondents in their oppositions. As discussed below, it is hard to see how the DBE program authorized by Congress, required by DOT, and implemented by Nebraska exclusively within its borders can

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[1] Respondents have not argued that the gender-based provisions of the statute, regulations, and state program are separable from the race-based provisions or subject to less than strict scrutiny.

satisfy strict scrutiny if no one had evidence of discrimination in the state.

Fourth, respondents do not dispute that Nebraska's DBE program caused Gross Seed to lose work solely because of the race of Gross Seed's owners. *See* Pet. 10 (discussing the Brownlee Spur project). In this case, race was not merely one factor among many that counted against Gross Seed—it was the deciding factor. *Compare Gratz* v. *Bollinger*, 123 S. Ct. 2411, 2428 & n.19 (2003) (university's use of race in undergraduate admissions violated Equal Protection Clause where race became the "decisive" factor in practice) *with Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2342 (2003) (permitting use of race as a "plus" factor when giving individualized consideration to law school applicants). Thus, as the DBE program was applied in this case, the Eighth Circuit was quite wrong to say that "race is made relevant in the program, but it is not a determinative factor." Pet. App. 12a.

2. The three questions presented in Gross Seed's petition ask whether TEA-21, DOT's regulations, and the Nebraska DBE program can survive strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). Thus, as in *Adarand II*, this case "presents questions of fundamental national importance calling for final resolution by this Court." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam). Respondents fail to show that those questions are no longer important.

All agree that, in enacting TEA-21, Congress had to have a "strong basis in evidence" for concluding that the statute's race-based provisions were needed as a remedy for past or present discrimination in the construction industry. Pet. 17; Pet. App. 6a; Fed. Opp. 16-17; Neb. Opp. 10-11. Congress, however, made no findings in TEA-21 that might support the 10% set aside contained in that statute. Strict scrutiny requires more of the legislature before it classifies citizens by

race. *See City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 510 (1989) ("Proper findings * * * are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.") (plurality opinion).[2]

The federal respondents point to "anecdotal evidence" (Fed. Opp. 3) of discrimination offered by individual Members of Congress in floor statements, but this Court has held that such evidence is "of little probative value in establishing identified discrimination" and "has no place in equal protection analysis." *Croson*, 488 U.S. at 500, 501. *See also Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 89 (2000) ("evidence consist[ing] almost entirely of isolated sentences clipped from floor debates and legislative reports" fell "well short of the mark"). Other Members, moreover, took a different view. *See, e.g.*, 144 Cong. Rec. S1400 (1998) ("there is no legislative record to support this racial classification") (statement of Sen. Sessions).[3]

The federal respondents cite more substantial evidence that African Americans encounter greater difficulty obtaining business loans than other business owners (Fed. Opp. 4), but if discrimination by lenders is the primary justification for TEA-21, the statute is simultaneously overbroad and underinclusive: overbroad because construction contract set asides go far beyond the problem of discriminatory lending practices, and underinclusive because such set asides do not in any way redress discrimination against would-be borrow-

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[2] The federal respondents do not help their cause by citing *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), and comparing TEA-21 to the Family and Medical Leave Act (Fed. Opp. 20), because, unlike here, Congress at least made some findings in support of the FMLA and, unlike TEA-21, the FMLA treats both sexes and all racial groups equally.

[3] Notably, the federal respondents attempt to distance the Eighth Circuit's decision from the "Appendix" on which the Tenth Circuit heavily relied in *Adarand II*. Fed. Opp. 17.

ers other than construction contractors. *See Builders Ass'n of Greater Chicago* v. *City of Chicago*, 298 F. Supp.2d 725, 741 (N.D. Ill. 2003) ("Goals do not directly impact difficulties in accessing credit. A set-aside does not address discriminatory loan denials or higher interest rates."). Furthermore, the federal respondents do not show that the problems faced by African American business loan applicants also affect (or equally affect) other minority groups and women.

The federal respondents also cite certain "disparity" studies purporting to show "underutilization" of minority-owned firms in government contracting in particular states. Fed. Opp. 4-5 & n.4, 19-20. Assuming *arguendo* that those studies represent probative evidence of discrimination in the studied jurisdictions, such evidence would not warrant the assumption that similar discrimination exists in every state or justify the imposition of federally-mandated programs in all of the 50 states. *See Croson*, 488 U.S. at 505 (presence of discrimination in one jurisdiction cannot be "extrapolat[ed]" to other jurisdictions); *City of Boerne*, 521 U.S. at 532-533 (Religious Freedom Restoration Act "cannot be considered remedial" because of, *inter alia*, the lack of "geographic restrictions" upon RFRA's applicability; in contrast, voting rights provisions upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), "were confined to those regions of the country where voting discrimination had been most flagrant"); *Kimel*, 528 U.S. at 90 (report showing pattern of governmental age discrimination in California "insufficient to support Congress' 1974 extension of the [Age Discrimination in Employment Act] to every State of the Union").

Lacking evidence of discrimination in all 50 states—or even anywhere close to 50 states—respondents defend the broad federal mandate of the DOT regulations that all states implement a DBE program by repairing to the Eighth Circuit's statement that "a valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where

its race-based measures are demonstrably needed." Pet. App. 8a-9a (emphasis in original). *See* Fed. Opp. 13, 23; Neb. Opp. 11. Here, however, the need for a race-based program in Nebraska has not been demonstrated. As noted above, the Nebraska respondents concede that they did not even look for evidence of discrimination. Neb. Opp. 5-6. And if Congress had before it any evidence of discrimination in Nebraska, petitioner is unaware of that evidence, and respondents do not cite it.[4]

Quite simply, a race-based program cannot be narrowly tailored if it applies to a state or other jurisdiction where there is no evidence that discrimination is a problem. Nebraska clearly could not adopt its own race-based state DBE program as a remedy for discrimination without evidence of discrimination in Nebraska. How then can DOT require Nebraska to have such a program when the federal government also lacks evidence of discrimination in the state?

The federal respondents note (Fed. Opp. 7) that, in setting an annual goal for DBE participation, DOT's regulations instruct states that the goal "must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination." 49 C.F.R. § 26.45(b). But calculating the level of DBE participation there would be in a hypothetical world absent the effects of historic discrimination is at best an exercise in speculation and at worst an impossible task. It is anyone's guess how Nebraska would have arrived at that number, particularly given the lack of any effort by anyone to identify or quantity such discrimination in the state.

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[4] The testimony of an NDOR official to the effect that "outside of the program the DBE community does not get as much work as they do when there are program goals" (Neb. Opp. 5) is not, as the Nebraska respondents contend, "an indication of some discrimination" (*id.*) against DBEs, but merely states the obvious—that DBE programs achieve their intended effect of funneling work to DBEs.

DOT's DBE regulations buckle under scrutiny for still another reason. The regulations confer the exact same preference upon, and draw no distinctions among, all six of the presumptively disadvantaged groups—"women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, [and] Subcontinent Asian Americans." 49 C.F.R. § 26.67(a)(1). But the discrimination faced by each of those groups is not, and has not been, the same. The history of discrimination against African Americans in this country is not the same as the history of discrimination against women or Native Americans. Yet the DOT regulations lump all six groups together as if there were no relevant differences among them and the prejudice they have experienced. Nor do the regulations account for regional differences. The preference for an Hispanic-owned firm is the same in California as it is in Connecticut. For these reasons, the regulations cannot be said to be narrowly tailored.

It should also be noted, and it is relevant to the strict scrutiny analysis, that the six groups eligible for TEA-21's 10% set aside together constitute a *majority* of the American population. This fact may cast doubt upon the purportedly remedial purpose of the program. *See Croson*, 488 U.S. at 495-496 ("heightened judicial scrutiny" of Richmond program "appropriate" since "blacks constitute approximately 50% of the population of the city of Richmond" and hold "[f]ive of the nine seats on the city council") (plurality opinion). TEA-21 is not a statute in which the majority, acting contrary to its self interest, has disadvantaged itself by adopting protections for the minority; rather, TEA-21 works to the benefit of groups representing a majority of American citizens and voters.

Finally, none of the evidence respondents cite explains why the TEA-21 set aside is set at 10%. The evidence provides no insight into how Congress arrived at that figure or why that amount is an appropriate remedy. To an onlooker, the 10% figure appears plucked from thin air. If the evidence

before Congress adequately supports a 10% set aside, it is hard to see why it would not also support a 20%, 30%, or even greater set aside.

3. Pointing to the Eighth Circuit's statement that it took a "hard look" at the evidence (Pet. App. 7a), the federal respondents argue that the first question presented in *Adarand II*—*i.e.*, whether the Tenth Circuit misapplied strict scrutiny in that case—is not presented in this case. Fed. Opp. 27-28. Indeed, both respondents repeatedly quote the Eighth Circuit's "hard look" statement, as if merely by saying it looked hard, *ipso facto*, the court applied the proper scrutiny. Fed. Opp. at 12, 17, 18, 28; Neb. Opp. 3, 10. But the Constitution requires more than verbal assurances. Just because the Eighth Circuit *said* it took a hard look does not mean it actually applied strict scrutiny in the correct manner. The Tenth Circuit in *Adarand II* also said that it was applying strict scrutiny, but this Court granted the writ to determine whether in fact it had done so. *See Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000) ("Our evaluation of the * * * program utilizes the 'strict scrutiny' standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case."), *cert. granted*, 532 U.S. 967 (granting review on the question "[w]hether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination."), *writ dismissed*, 534 U.S. 103 (2001).

4. Respondents urge the Court to deny review for want of a circuit split. Fed. Opp. 16, 21; Neb. Opp. 9-12. As shown in the petition, however, the decision below is at odds with *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001). Pet. 23-25. Like this case, *Rothe* involved an equal protection challenge to a racially discriminatory federal contracting preference. It is clear, moreover, that if the Eighth Circuit in this case had applied the same level of scrutiny applied by the Federal

Circuit in *Rothe* the outcome of this case would have been different. For example, in reversing the District Court, the Federal Circuit in *Rothe* faulted the lower court for failing to "determine whether evidence of discrimination [was] sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged groups included under the * * * program." *Rothe*, 262 F.3d at 1330. Here, of course, the District Court did not consider the sufficiency of the evidence supporting preferences as to each of the six groups favored under the DOT regulations. Nor did the Eighth Circuit require the District Court to do so. The stark inconsistency between the decision below and *Rothe* warrants review.

In addition, in *Adarand II* this Court granted certiorari, not to resolve any circuit split, but rather "to review for a second time whether the Court of Appeals was correct when it concluded that the [DOT DBE] program is consistent with the constitutional guaranty of equal protection." *Adarand* v. *Mineta*, 534 U.S. at 105. That is the same question "of fundamental national importance" (*id.* at 110) presented in this case, and that question warrants this Court's review even in the absence of a circuit split, just as it did in *Adarand II*. Even without a circuit conflict, this Court has granted the writ based upon the high importance of the question presented. *See, e.g.*, *PhRMA* v. *Walsh*, 123 S. Ct. 1855, 1860 (2003) ("[W]e granted certiorari because the questions presented are of national importance.").

The federal respondents state that review is not warranted because two federal courts of appeals and five district courts have rejected challenges to TEA-21. Fed. Opp. 16, 21. Once unpacked, however, those figures lose their punch. The two circuit court cases consist of *Adarand II*—in which this Court granted certiorari—and this case—in which petitioner seeks certiorari. And the five district court cases consist of the Colorado case appealed to the Tenth Circuit in *Adarand II*; the Nebraska and Minnesota cases appealed to the Eighth

Circuit in this case; a Washington case now on appeal; and an Illinois case in which the time to appeal has not run.

5. The Nebraska respondents point out that the DBE program is in the process of reauthorization. Neb. Opp. 6-8. But as the federal respondents correctly observe, both the Senate and House of Representatives have passed bills containing identical language reauthorizing TEA-21's race- and gender-based 10% set aside. Fed. Opp. 3 n.2. Thus, given the near certainty that the set aside will be reauthorized, the upcoming expiration of TEA-21 (which, after two extensions, is now set to occur on April 30, 2004) is not a reason to deny the writ. *Cf. Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 224 (2000) (per curiam) ("Because, under the circumstances of this case, it is impossible to conclude that respondents have borne their burden of establishing that it 'is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' petitioner's cause of action remains alive.") (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). For their part, the federal respondents do not cite the reauthorization of TEA-21 as a reason to deny the writ. And neither the federal nor Nebraska respondents indicate in their oppositions that they are preparing to suspend their DBE programs at the end of this month.

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For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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